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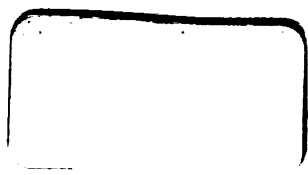
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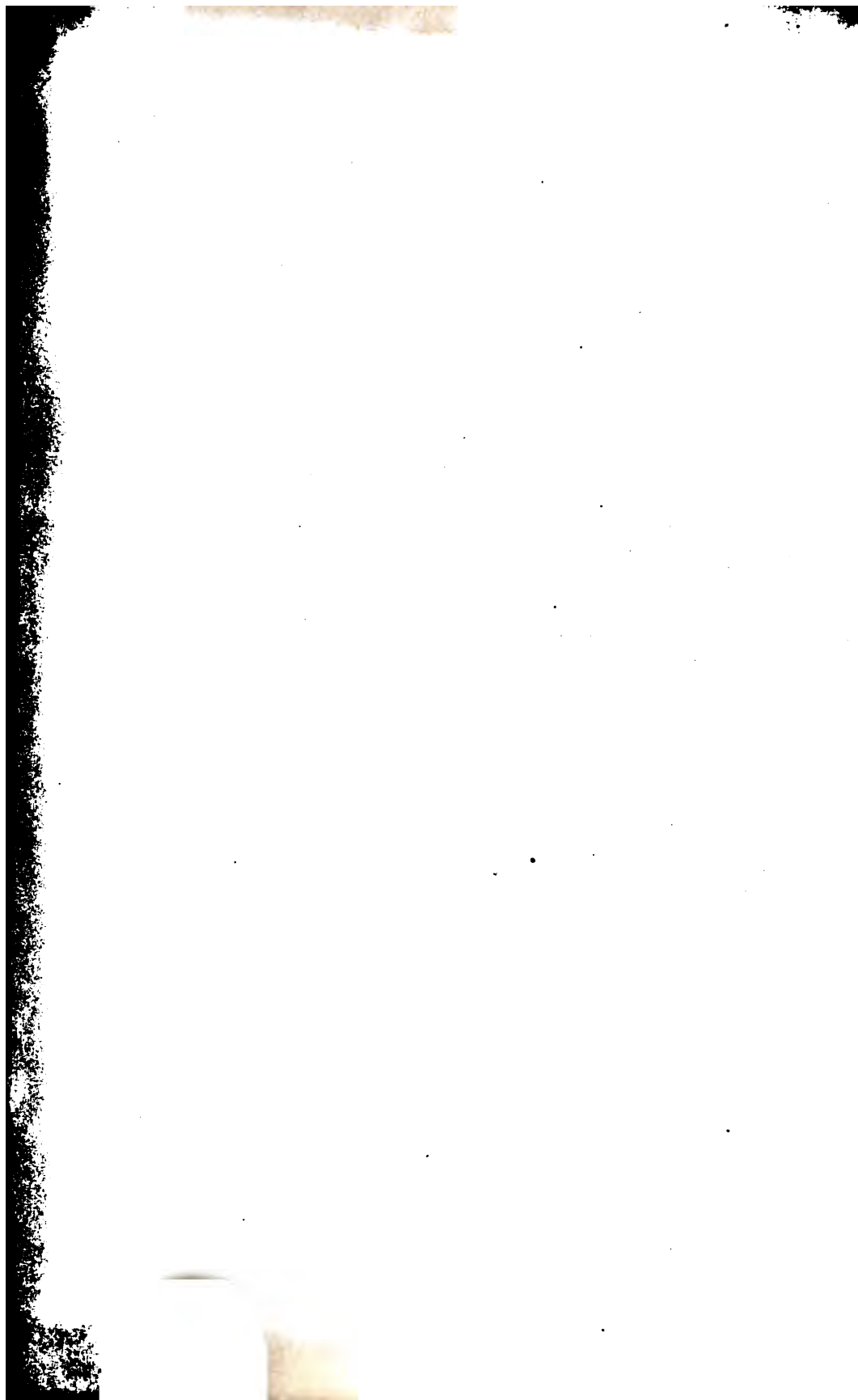


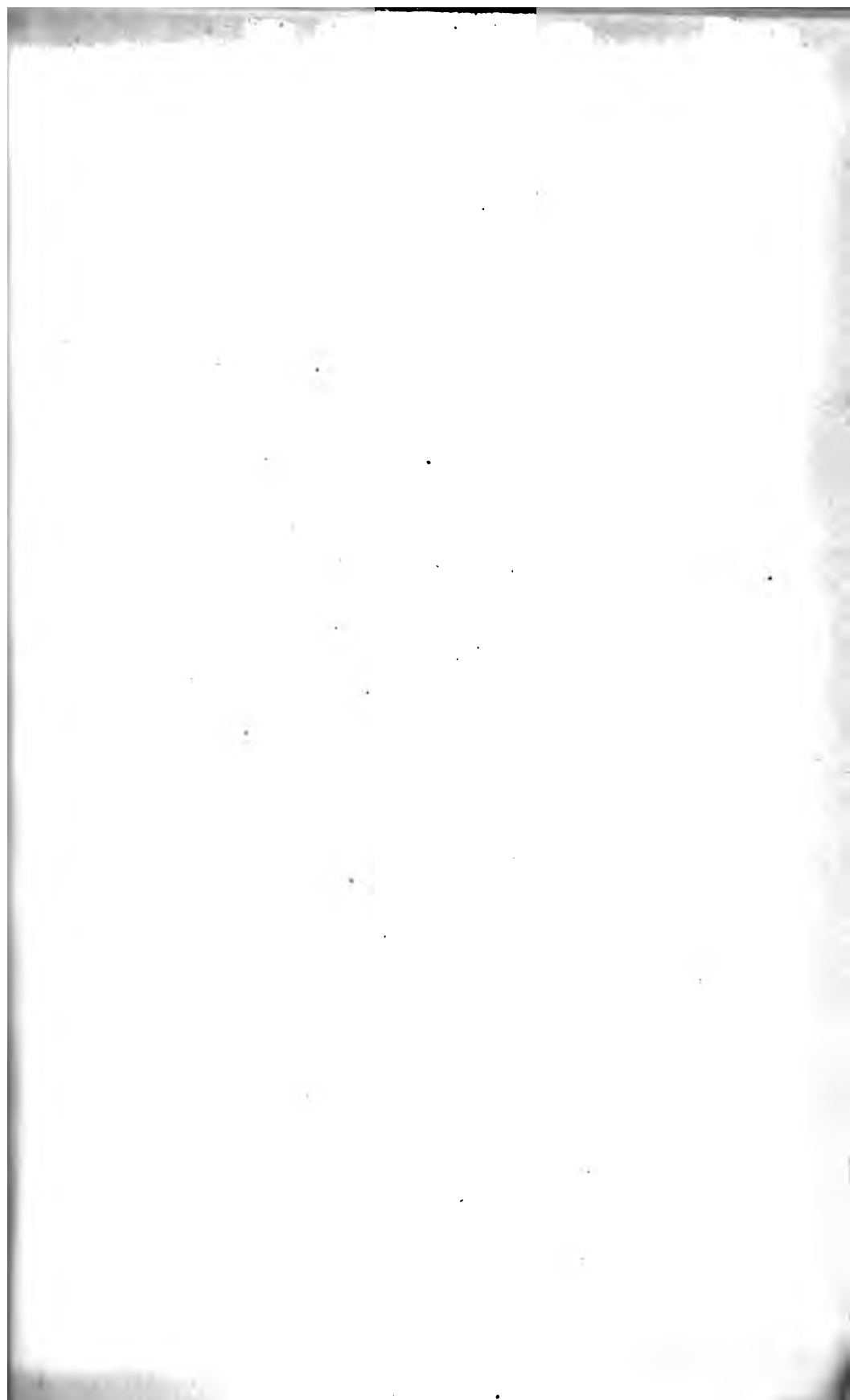


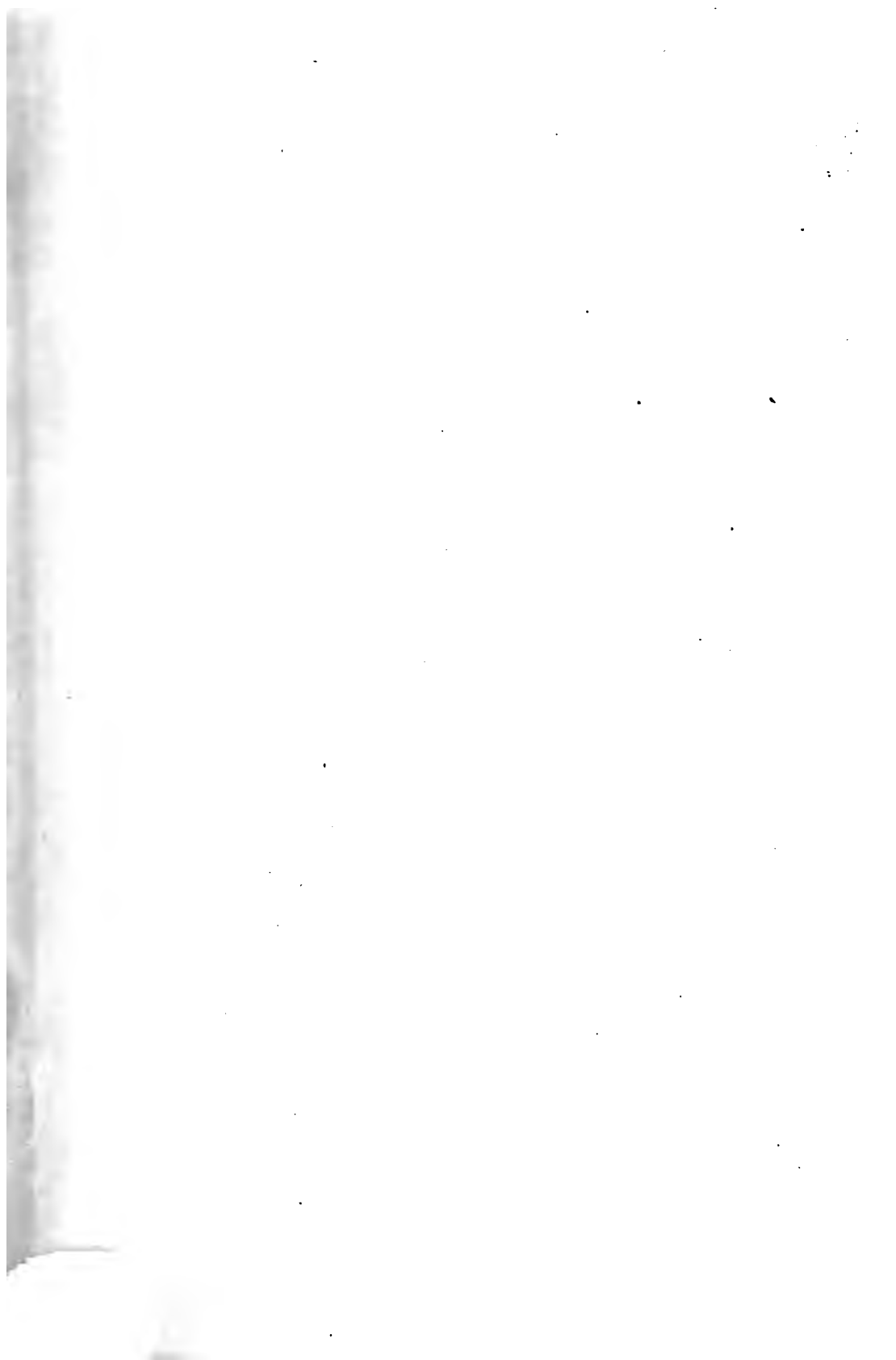




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A COMPENDIUM  
OF THE  
LAW AND PRACTICE  
OF  
VENDORS AND PURCHASERS  
OF  
REAL ESTATE.

By J. HENRY DART,  
OF LINCOLN'S INN, ESQ., BARRISTER AT LAW.

WITH COPIOUS NOTES AND REFERENCES  
TO THE AMERICAN AND ENGLISH DECISIONS.

ALSO,

A PREFATORY VIEW OF THE EXISTING LAW OF REAL PROPERTY IN  
ENGLAND AND THE UNITED STATES.

By THOMAS W. WATERMAN,  
COUNSELLOR AT LAW.

*Aequitas est rerum convenientia, quae paribus in causis, paria jura desiderat, et omnia verè comparat, et dicitur aequitas, quae aequalitas.*—*Bracton*, lib. 1, c. 3, sec. 20.

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1851.

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**GEO. H. BELL, Print. 144 Nassau St.**

## PREFACE

### TO THE AMERICAN EDITION.

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THE design and scope of this work may be gathered from the Author's preface. It is "to supply the student with a concise and connected statement of the present law and practice affecting vendors and purchasers of real estate, and the practitioner with a portable book of reference to the recent and the most important early authorities on the subject."

An examination of the work will determine how far and how faithfully the plan proposed has been executed. The reader will discover that it is an elegant, learned, and lucid exposition of one of the most interesting and, at the same time, most abstruse branches of the law. He will find the arrangement good, and the several points clearly stated and satisfactorily supported by authorities. He will, moreover, be aided in his investigations by a very copious index and a very full table of contents and table of cases.

Having been very recently issued from the London press, it contains numerous important decisions which cannot be found in any other treatise. It has profited by the labors of all its predecessors in this field of inquiry, and has aimed (as we think successfully) at a mean between meagerness of statement on the one hand and prolixity on the other. Whatever in

SUGDEN ON VENDORS is still law, has been carefully preserved, freed from cumbrous and useless detail; while all that is obsolete and, consequently, of no practical utility, has been dropped.

That the work will fully answer the purposes of its Author, as announced above, there cannot be a doubt. Indeed, it must eventually become a text book for students, be the companion of every lawyer, and go into the hands of many holders of real estate who do not belong to our profession.

The present American is considerably enlarged from the English edition. The notes which are extremely copious contain very full citations from the English as well as American cases, and from all the works which could throw light on the subjects treated. Among the more important of the latter may be mentioned the TREATISE OF SIR E. SUGDEN ON VENDORS; THE AMERICAN CHANCERY DIGEST, *third edition*; and Mr. *Barbour's* PRACTICE OF THE COURT OF CHANCERY. The "*View of the Law of Real Property in England and the United States, by the American Editor*," though not strictly appropriate in a work confined to vendors and purchasers, is yet given as a convenient epitome of a kindred branch of the same interesting and important subject.

THOMAS W. WATERMAN.

*New York, No. 77 Nassau Street, July 10th, 1851.*

## PREFACE

### TO THE ENGLISH EDITION.

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THE object proposed by the author of the following pages has been to produce a work which, without being a mere elementary outline on the one hand, or a mere index of cases on the other, may supply the student with a concise and connected statement of the present law and practice affecting vendors and purchasers of real estate, and the practitioner with a portable book of reference to the recent and the most important early authorities on the subject.

The general arrangement is, so far as practicable, chronological : considering in regular order the several points which present themselves to notice in cases where an ordinary contract is completed in the usual way, without litigation actual or threatened ; and then discussing, under separate heads, the remedies of either party or his representatives in cases where the opposite party refuses, neglects, or is unable to perform his agreement, and also, the variations consequent on the sale being under a decree of the Court of Chancery. This order is believed to be best adapted to secure attention and aid the memory, and, therefore, the easiest for purposes of reference.

The establishment of a General Register will, of course, *eventually* effect considerable changes in the law and practice of sales ; but, inasmuch as *no* part of the present system would become wholly obsolete until many years after such a plan had

received the assent of the Legislature, it has not been considered necessary or expedient to delay the publication of the present work. Should, however, a Register Act be passed in the approaching session, the author proposes to publish, by way of supplement, some remarks upon the general provisions and apparent effect of the enactment.

In conclusion, he cannot but express a hope that the following pages may be found to be of practical utility. That a treatise of this description was wanting, has, he believes, been long the opinion of many members of the profession; among whom, as an authority, he may name the late Mr. *Duval*, upon whose expressed opinion to that effect, and in whose lifetime the present work was, in fact, undertaken. The author's professional engagements, however, have extended its preparation over a longer period than its moderate bulk would, perhaps, seem to require; the task, moreover, having, in itself, been one of considerable labor, as he has examined, and endeavored to form an independent opinion upon the applicability of every authority cited: defects, however, he is fully sensible, must and do exist; many of which an undivided attention might possibly have removed; but, in submitting the volume to the profession, he has, at least, the satisfactory assurance that the most able are, also, in general, the most candid and lenient critics.

20, *Southampton Buildings*,  
*Chancery Lane*,  
1st January, 1851.

A. GENERAL COMPARATIVE VIEW  
OF THE  
LAW OF REAL PROPERTY

IN ENGLAND AND THE UNITED STATES.

BY THE AMERICAN EDITOR.

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1. *Origin of property.*
  2. *Distinctive features of the law of real property in the two countries.*
  3. *Title to land.*
  4. *Estate in fee simple.*
  5. *Estates tail.*
  6. *Tenancy by the curtesy.*
  7. *Dower.*
  8. *Lease.*
  9. *Mortgage.*
  10. *Joint interest in land.*
  11. *Descent.*
  12. *Will or devise.*
  13. *Alienation of property.*
  14. *Modes of conveyance.*
  15. *Capacity of feme covert to convey.*
  16. *Liability of land for debt.*
- 

1. *Origin of property.*

The origin of property is a subject of curious and useful speculation.

"The sense of property," says Kent, (2 Kent Com. 318,) "is inherent in the human breast; and, the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigor and maturity among polished nations, forms a very instructive portion of the history of civil society."

—“There is nothing,” says Blackstone, (2 Black. Com. 2,) — which so generally strikes the imagination, and engages the affections of mankind, as the right of property ; or, that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet, there are very few that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are, with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title ; or, at best, we rest satisfied with the decision of the laws in our favor, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner ; not caring to reflect, that, (accurately and strictly speaking,) there is no foundation in nature, or in natural law, why a set of words upon parchment should convey the dominion of land— why the son should have a right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him ; or, why the occupier of a particular field, or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him.”

Chancellor Kent remarks that, “to suppose a state of man prior to the existence of any notions of separate property, when all things were common, and when men throughout the world, lived without law or government, in innocence and simplicity, is a mere dream of the imagination. It is the golden age of the poets which forms such a delightful picture in the fictions adorned by the muse of Hesiod, Lucretius, Ovid, and Virgil. And we find the Roman historians and philosophers rivalling the language of poetry in their descriptions of some imaginary state of nature which it was impossible to know, and idle to conjecture. No such state was intended for man, in the benevolent dispensations of Providence ; and, in following the migrations of nations, apart from the book of Genesis, human curiosity is unable to penetrate beyond the pages of genuine history ; and Homer, Herodotus, and Livy, carry us back to the confines of the fabulous ages. Man was fitted and intended by the Author of his being, for society and government, and for the acquisition



and enjoyment of property. It is, to speak correctly, the law of his nature; and by obedience to this law he brings all his faculties into exercise, and is enabled to display the various and exalted powers of the human mind."

Exclusive property, in the temporary use of the soil being a natural right, and ratified by the express gift of God, cannot be taken away by the laws of society. It owes its origin to the necessities of the species, and commences before the institution of civil society, and beginning of states. It is to secure it that political associations are organized; and it never becomes more permanent till governments acquire stability and firmness. As long as men remained in the wandering state of hunters and shepherds, the temporary use of a particular spot was all that their necessities required. The ceremony provided by the law of nature to indicate one's intention to appropriate a portion of the common property to private use, is occupancy. The enjoyment having commenced, if he chose to exchange places with his next, or some remoter neighbor, he could transfer his right by another public and notorious ceremony, such as livery of seisin, or permitting the transferee to enter. This peaceable mode of exchange between persons tired of their respective situations, being found preferable to a violent one, it would be frequently repeated, and thus become in time the customary law of the society. If an individual occupied a spot for pasturage, as the first occupation would be justified by the law of nature, so would be its continuance; and if his neighbor had, in the same manner, occupied a tract for culture, a desire of changing pursuits might lead to an exchange of lands which would be evidenced by mutual occupations, entries, or liveries of seisin. All this might take place without any right to the substance of the soil being recognized, since upon abandonment of the places which had thus been the subjects of exchange, they might be occupied by any other member of the society. For the temporary exercise of a *common* right cannot make it *exclusive*. But permanent property in the soil itself, with its concomitants, descent, devise, partition and alienation, are creatures of civil polity. The law of nature allows to each individual the temporary exclusive use of as much as his necessities demand. The law of the land determines the quantity of estate which each individual may enjoy, alien, devise, forfeit, or leave to descend to his children. The idea of property in the substance of the earth cannot be far

in advance of an exchange of one spot for another, or of the right to cultivate one place, for the right to depasture another. So also, when the mere making an improvement gives us the right to exclude others from the common property within a certain distance around such improvement; when we are not presumed to have relinquished our improvements until we have left them unoccupied for a certain length of time; when we may transfer them at our will and pleasure while we live, and designate the persons who shall enjoy them when we die; or when, if we neglect it, the law will secure them to our children.

*2. The distinctive features of the law of real property in the two countries.*

The term real estate, means an estate in fee, or for life in land, and does not comprehend terms for years, or any interest short of a freehold. (2 Kent, 401; 2 Cowen's Rep. 497.)

The existing law concerning real property forms a very artificial system. In England, the deep traces of the feudal policy are visible in every part of the doctrine of real estate, and the technical language and many of the technical rules and fictions of that system, are still retained. The Norman conquest overwhelmed landed property with feudal tenures and their burdensome privileges. To these, were early added the devices of ecclesiastical bodies to amortize land, or appropriate it to themselves in perpetuity. For this purpose, when prevented by the government, from acquiring it by direct means, they introduced a variety of inventions; as leases for long terms of 500, or 1000 years, recoveries in feigned actions at law, grants to nominal holders *to the use* of the religious house. These uses which were borrowed from the civil law, were not recognized by the judges of the land, but enforced by the Lord Chancellor, who was then usually of the clergy. The two former practices, the government very early extinguished, as far as they were evasions against the law of mortmain; though they are still in use as are artificial modifications of property. Against equitable uses too, it interfered; first in the reign of Richard III., and afterwards, in that of Henry VIII., but unsuccessfully, since chancery has still preserved them under the name of *Trusts*. By the reduction indeed, of these to a system, they have assumed a settled character. They however still form a body of laws, distinct from, but operating concurrently and occasionally,

in conflict with, the rules of common law ; not only over the same property, but even over the different modifications of it, in the same instrument. "Though the intricacies and burdens of tenure," says a modern English writer, "were greatly diminished at the Restoration, yet much of the original system still remains ; together with many theories built upon it, and fictions, invented occasionally to elude it. The whole tinctures deeply our laws of landed property ; though discordant from the sentiments and habits of modern society, and even from the leading maxim of modern law, which usually regards land as a commercial property, and discountenances all undue restriction on its alienation. When we add, the various local customs, the inaptitude of such a body of law to the purposes of commerce, and to the rights of creditors ; the subtle refinements of uses and trusts ; the distinct and intricate laws of tithes ; and numerous other servitudes on land, of less ostensible description, we cannot but be sensible of a dense medium interposed between us, and the only legitimate qualities of property ; namely, its capacities of enjoyment, succession, and alienation ; its liabilities, to the debts of the owner, and to his duties to the state."

In the United States, the law of real property though less artificial, and less encumbered with details and nice distinctions than in England, yet forms a very important branch of our jurisprudence. "When our forefathers first settled here, justice was administered in a summary and paternal mode, and though the English common law was the basis of the laws of the colonies, yet no more of it was in fact introduced than was thought to be suited to their condition. Parts of the system were never adopted ; others fell into disuse. The colonial legislatures were constantly altering it by statutes ; and customs, greatly modifying it, grew up gradually, and silently. The changes that were introduced, whatever their defects may be, had a healthy and vigorous character, as they were not made to suit the antiquated system of feudalism, but the actual state and wants of the community. The fathers of our country were so fortunately situated that it was in their power to introduce the wisdom of a highly civilized nation, while they had scarcely any of the obstacles to encounter which in an old country, the prejudices of many, and the interests of a few, always throw in the way of improvements. They could apply remedies directly and promptly to the sources of evil, and with a single view to the general

welfare." Hence our exemption from those feudal restrictions which, in the old world, interpose so many impediments to the transfer or alienation of lands. The restlessness and ceaseless enterprize moreover which enter so largely into our national character, lead to a constant interchange of property. To this add the extent of our territory and the cheapness of our soil, which, in some sections, though rich in the bounties of nature, has scarcely any nominal value, and it will be readily perceived that there must, in the very nature of things, be a wide difference between the American and English law of real property. Still, this law owing to our rapid increase in population and wealth, is yearly becoming more important. The refining and elevating influences of our widely diffused intelligence, show themselves no less in the tasteful decorations than in the substantial comforts of our homes, and the embellishments of art, while they beautify, and enhance the pecuniary value of our lands, also increase our local attachments, and our estimate of property in the soil.

### 3. *Title of land.*

In England there are no lands to which the term tenure does not strictly apply, nor any proprietors of land, except the king, who are not legally tenants. Indeed, tenure is inseparable from the idea of property in land, according to the theory of the English law. To express the highest interest that a subject can have in land, the terms fee simple, or a tenancy in fee, are used and some other person is supposed to retain the absolute and ultimate right. The king is, by fiction of law, the great lord paramount, and supreme proprietor of all the lands in the kingdom, and for which he is not bound by services to any superior. So thoroughly does this notion of tenure pervade the common law doctrine of real property that the king cannot grant land to which the reservation of tenure is not annexed though he should declare otherwise in express words. (3 Kent Com. 485.)

In this country, we have adopted the fundamental principle in the English law, relative to the source of title to land, and applied it to our republican government. Hence, it is a settled doctrine with us, that all valid individual title to land within the United States, is derived from the grant of our own local governments, or from that of the United States, or from the crown, or royal chartered governments, established here prior to the revolution. (See 3 Kent's Com. 377, 378.) When this continent

was first discovered the discovery was held to give to the government by whose subjects or authority it was made, a title to the country, and the sole right of acquiring the soil from the natives as against all other European powers. The relation which subsisted between the discoverer and the Indians necessarily impaired to a great degree, the rights of the original inhabitants, and the Europeans, by their superior genius, soon obtained the ascendancy, assuming the ultimate dominion of the soil to be in themselves, and claiming the exclusive right to grant a title to it, subject only, to the Indian right of occupancy. "This assumed, but qualified dominion over the Indian tribes" says Kent, (3 Kent's Com. 380, 381,) "regarding them as enjoying no higher title to the soil than that founded on simple occupancy, and to be incompetent to transfer their title to any other power than the government which claims the jurisdiction of their territory, by right of discovery, arose, in a great degree, from the necessity of the case. To leave the Indians in possession of the country, was to leave the country a wilderness; and to govern them as a distinct people, or to mix with them and admit them to an intercommunity of privileges, was impossible under the circumstances of their relative condition. The peculiar character and habits of the Indian nations rendered them incapable of sustaining any other relation with the whites, than that of dependence and privilege. There was no other way of dealing with them than keeping them separate, subordinate, and dependent, with a guardian care thrown around them, for their protection. The rule that the Indian title was subordinate to the absolute, ultimate title of the government of the European colonists, and that the Indians were considered as occupants, and entitled to protection in peace, in that character only, and incapable of transferring their rights to others, was the best one that could be adopted with safety. The weak and helpless condition in which we found the Indians, and the immeasurable superiority of their civilized neighbors, would not admit of the application of any more liberal and equal doctrine to the case of Indian lands and contracts. It was founded on the pretension of converting the discovery of the country into a conquest; and it is now too late to draw into discussion the validity of that pretension, or the restrictions which it imposes. It is established by numerous compacts, treaties, laws, and ordinances, and founded on immemorial usage. The country has been colonized and

no court of justice can permit the right to be disturbed by speculative reasonings on abstract rights." It was a long time a question in the State of New York, whether the constitutional prohibition of purchases from the Indians was applicable to purchases from individuals, or only those from the Indian nations or governments. It was finally held to extend to the former, being introduced for the benefit and protection of the Indians, as well as the good of the state, and therefore entitled to a benign and liberal interpretation. (See 1 Hilliard on Real Property *and cases cited.*)

The idea of tenure, or in other words the holding of a superior lord, also pervades the law of real property in this country. Indeed, the only feudal fictions and services which can be presumed to be retained, in any part of the United States, consist of the feudal principle that the lands are held of some superior, or lord, to whom the obligation of fealty, and to pay determinate rent, are due. Though the title to land is essentially allodial, and every tenant in fee simple, has an absolute and perfect title, yet, in technical language his estate is called an estate in fee simple, and the tenure free and common socage. By socage tenure is meant lands held by a fixed and determinate service, which is not military, nor in the power of the superior to vary at pleasure. The certainty, and pacific nature of the service, rendered this species of tenure a safe guard against the wanton exactions of the feudal lords, and made it of great value in the view of the ancient English; so that they esteemed it a point of the utmost importance to change their tenures by knight service, into tenure by socage. Socage tenures, are however, of feudal extraction, and retain some of the leading properties of feuds. (See 3 Kent's Com. 509.) But though the doctrine of feudal tenure by fee and common socage, may be applicable in theory, to a great part of the real property in this country, chartered and possessed before our revolution, and though every proprietor be considered as holding an estate in fee simple, none of the inconveniences of tenure are felt or known, and the tenant in fee, is, to all intents and purposes, *absolute owner*. In Ohio, and the other Western States formed from the North Western Territory, it is maintained that in consequence of the ordinance of 1787 as the ground work of their laws and the absence of any adoption or immemorial usage of English principles, not one doctrine remains in force that can be deduced from *tenure*,

but real estate is owned by an absolute and *allodial* title. The New York revised statutes abolish the existing theory of feudal tenures of every description, with all their incidents and declare all lands within the state to be allodial, and vest the entire and absolute property in the owners according to the nature of their respective estates subject only to the liability to escheat. (N. Y. R. S. vol. 1, 718, sec. 3.) So the statute law of Connecticut, (Rev. L. 348) after reciting that whereas, by the establishment of the independence of the United States the citizens of the state became vested with an *allodial* title to their lands provides that every proprietor of lands in fee simple has an *absolute and direct property and dominion* therein, and that patents or grants, from the general assembly of the colony according to the charter of Charles II., are effectual in passing an estate to the purchasers and their heirs forever. In Maryland, Pennsylvania and Michigan, lands are declared to be holden by an allodial title. (5 Rawle, 112, 113; 10 Gill & John. 443; Mich. L. 393.) "On the whole, it may be safely said, that with regard to the whole United States alike, the feudal system *as a law of tenures* is abolished; and the remark of Chancellor Kent (4 Kent's Com. 3,) is strictly true, that an estate in fee and pure *allodium* and an estate in fee simple absolute both mean the most ample and perfect interest, which can be owned in land." (See Hilliard on Real Property, vol. 1, p. 81.)

#### 4. *Estate in fee simple.*

In England, to create an estate in fee simple, words of inheritance are necessary: that is, the gift must be to the grantee *and his heirs*, unless in cases of wills, where tantamount expressions are admitted. The limitation to the heirs must be made in direct terms, or by immediate reference; and no substituted words of perpetuity, except in special cases, will be allowed to supply their place. If a man purchases lands to himself forever, or to him and his assigns forever, he takes but an estate for life. Though the intent of the parties be ever so clearly expressed in the deed, a fee cannot pass without the word heirs. This rule is of feudal origin. Feuds were anciently granted chiefly with reference to the personal qualifications of the grantee, and therefore terminated with his life, unless the intent of the donor manifestly appeared to the contrary. But the rule has exceptions. Grants to corporations aggregate pass the fee without the words

heirs or successors, because in judgment of law a corporation never dies, but is immortal, by means of perpetual succession. (Co. Litt. 9. b. 273.) In wills a fee will also pass without the word heirs, if the intention to pass a fee can be clearly ascertained from the will, or a fee be necessary to sustain the charge or trust created by the will. Equity will also supply the omission of words of inheritance; and in contracts to convey, it will sustain the right of the party to call for a conveyance in fee, when it appears to have been the intention of the contract to convey a fee. (Comyn's Dig. tit. *Chan.*)

The New York revised statutes, (vol. 2, p. 33,) provides that "the the term '*heirs*,' or other words of inheritance, shall not be requisite to create or convey, an estate in fee; and every grant or devise of real estate, or any interest therein, hereafter to be executed, shall pass all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest, shall appear by express terms, or be necessarily implied in the terms of such grant." And further, that "in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of, any estate or interest in lands it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law." In Virginia, Kentucky, Mississippi, Missouri and Alabama, the words heirs, or other words of inheritance, are no longer requisite, to create or convey, an estate in fee; and every grant or devise of real estate, made subsequent to the statute, passes all the interest of the grantor or testator, unless the intent to pass a less estate or interest, appears in express terms, or by necessary implication. New Jersey, North Carolina, and Tennessee, have declared by statute that a devise of lands shall be construed to convey a fee simple, unless it appears, by express words or manifest intent, that a lesser estate was intended; leaving deeds to stand upon the settled rules and construction of the common law. The law is the same, in Georgia, Arkansas, and Illinois. In *Ames v. Burt*, 1 Verm. Rep. 306, it was held, that a lease to continue "for the full term of a thousand years, or as long as wood grows, or water runs" conveys an estate in fee.

##### 5. *Estates Tail.*

"The doctrine of estates tail" says Kent, (4 Kent's Com. 14,)



"and the complex and multifarious learning connected with it, have become quite obsolete, in most parts of the United States." In Virginia, Kentucky, Tennessee, North Carolina, Indiana, Georgia, Mississippi, Alabama, and Michigan, entailments are expressly abolished, or estates tail declared to be estates in fee simple. In South Carolina and Louisiana they never existed; while in other states they exist in a qualified degree. In Illinois, Missouri, and Arkansas, the donee in tail takes a life estate, and his issue a fee simple. In New Jersey, Ohio and Connecticut, estates tail become estates in fee simple in the heirs of the original owner. In Vermont, the constitution provides that the legislature shall regulate entails in such manner as to prevent perpetuities. In Pennsylvania, Maryland, Massachusetts, Maine, and Delaware, estates tail may be conveyed, and in Rhode Island and Virginia, conveyed or devised so as to pass a fee simple. "Entailments" says Kent (4 Kent's Com. 20) "are recommended in monarchical governments, as a protection to the power and influence of the landed aristocracy; but such a policy has no application to republican establishments, where wealth does not form a permanent distinction, and under which, every individual, of every family, has his equal rights, and is equally invited, by the genius of the institutions, to depend upon his own merit and exertions. Every family stripped of artificial supports, is obliged, in this country, to repose upon the virtue of its descendants, for the perpetuity of its fame."

#### 6. *Tenancy by the curtesy.*

The estate of *tenancy by the curtesy* is not peculiar to the English law, for it is found, with some modifications, in the ancient laws of Scotland, Ireland, Normandy and Germany. It is said not to be of feudal origin, but that it can be traced to one of the rescripts of the Emperor Constantine. It exists in most of the United States, as at common law, being generally noticed in the statutes, if at all, merely by a recognition of the common law rule. The right of the husband as tenant by the curtesy, is expressly given by statute, substantially in the language of Littleton, in the States of Maine, Massachusetts, Vermont, Rhode Island, Delaware, Michigan, and Indiana. In other states, it has been incidentally recognized as an existing legal estate, either in statutes or judicial decisions. In South Carolina, it has ceased, by provision of an act in 1791 relative to the distri-

*bution of intestate's estates*, which gives to the husband surviving his wife, the same share of her real estate as she would have taken out of his, if left a widow, and that is either one moiety or one-third of it, in fee, according to circumstances. In Georgia also, tenancy by curtesy does not exist; because all marriages since 1785, vest the real equally with the personal estate of the wife in the husband. In Louisiana the law of husband and wife, is based upon principles irreconcilable with the existence of tenancy by the curtesy. In Vermont, it seems the husband formerly had curtesy in a fee simple, only where the issue had died under age and without children; but now, curtesy is as at common law; with the exception, that if the wife leaves issue by a former husband, curtesy does not attach to such lands as descend to them.

The general rule is, that the wife or the husband in her right, must have been *seised* of the lands. And of corporeal hereditaments there must be a seisin in deed. Thus, if lands descend to a woman, who afterwards marries and has issue, but dies before entry, the husband shall not have curtesy. This rule has been changed in Connecticut, Pennsylvania, and Tennessee, and a *right to seisin* or *potential seisin* merely, there being no adverse possession, and whether such seisin were acquired by descent, devise or conveyance, there is sufficient to give curtesy. And the rule is not applicable to wild lands, of which the mere ownership, is in general equivalent to actual possession. Nor to incorporeal hereditaments, where no actual seisin is possible. Thus where a wife seised of a rent dies before it falls due, the husband shall have curtesy. In New York, the husband of a woman who is either heir or devisee, but has never entered, shall not have curtesy. It is said the requisition of actual seisin is limited to these two cases, and is not applicable where the wife claims under a deed; which by the statute of uses transfers actual seisin without entry. So, if the husband and wife recover her lands by suit, this is a sufficient seisin for curtesy. So with a decree for partition. In Pennsylvania, the husband shall not have curtesy, where the wife has a mere naked seisin, as trustee to the freehold, though she also holds a beneficial interest in the reversion. (See Hilliard on Real Property, vol. 1 p. 111, and authorities.) Upon this subject, Kent (4 Kent Com. 29,) says: "The wife, according to the English law, must have been seised in fact, and in deed, and not merely of a seisin in law, of an

estate of inheritance, to entitle the husband to his curtesy. The possession of the lessee for years, is the possession of the wife as reversioner; but if there be an outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate in reversion, or remainder, unless the particular estate be ended during the coverture. This is still the general rule at law, though in equity the letter of it has been relaxed by a free and liberal construction. The circumstances of this country have justly required some qualification of the strict letter of the rule relative to a seisin in fact by the wife; and if she be owner of waste uncultivated lands not held adversely, she is deemed seised in fact, so as to entitle her husband to his right of curtesy. The title to such property draws to it the possession; and that constructive possession continues, in judgment of law, until an adverse possession be clearly made out; and it is a settled point in our courts, that the owner of such lands is deemed in possession, so as to be able to maintain trespass for entering upon the land, and cutting the timber. To entitle the husband to curtesy, he must be a citizen and not an alien, for an alien husband was not at common law entitled to curtesy, any more than an alien wife was entitled to be endowed; and the wife must have had such a seisin as will enable her issue to inherit; and therefore, if she claims by descent or devise, and dies before entry, the inheritance will go, not to her heir, but to the heir of the person last seised, and the husband will not have his curtesy. The rule has been carried still further in this country; and in one state, where the title by curtesy is in other respects as in England, it is decided, that it was sufficient for the claim of curtesy, that the wife had title to the land, though she was not actually seised, nor deemed to be so. The law of curtesy in Connecticut, is made to symmetrize with other parts of their system; and, in that state, ownership, without seisin, is sufficient to govern the descent or devise of real estate."

#### 7. *Dower.*

The estate which the widow acquires by law, in a certain portion of her husband's real property, after his death, for the support and maintenance, is called *dower*. It is derived from the Germans, who when they established themselves in the southern parts of Europe, and reduced their customs into writing, fixed the portion of the husband's lands, which he might allot for the

wife's dower. The Longobardic Code directed that it should consist of a fourth part, the Gothic of the tenth; and in process of time, regular forms were invented for the purpose of constituting dower. The Saxons, like all the other German nations were well acquainted with the custom of dower; and a widow among them was entitled to a moiety of her husband's property for her life, but which she forfeited by a second marriage. It is not known whether the Conqueror made any alteration in the Anglo Saxon customs respecting dower; so that it probably continued to consist of a moiety of the husband's lands, upon condition that the widow remained chaste and unmarried. But by the charter of King Henry I. this condition of chastity and widowhood was only required where there was issue. This law however, seems to have been altered in the reign of King Henry II. Then every man was bound, both by the civil and ecclesiastical law, to endow his wife at the time of his marriage, either by naming the dower in particular, or by endowing her generally, of all his lands. If he endowed her generally, the wife was entitled to one third of the husband's freehold. If he named a dower which amounted to more than a third, it was not allowed, but was reduced to a third. Nor was the wife entitled to dower out of any of her husband's subsequent acquisitions, unless he specially engaged before the priest to endow her of them. Nothing is mentioned in King John's Magna Charta, or the first charter of Henry III., respecting dower; but in the charters of 1217, and 1224, it is declared that dower should consist of a third of all the lands which the husband held during his life, unless the wife had been endowed of a smaller portion, at the church door. (See 1 Greenl. Cruise, p. 163, 164.)

Dower may be stated generally to exist where a man is seised of an estate of inheritance, and dies in the lifetime of his wife. In that case, she is at common law entitled to be endowed of the third part of all the lands whereof her husband was seised, either in deed or in law, at any time during the coverture, and of which any issue which she might have had, might by possibility have been heir. (4 Kent, 34.)

In this country, the law relative to dower, though substantially as above, is yet somewhat varied by statute, in the different states.

As the wife's inchoate title is an incumbrance upon the land, it is usual for the purchaser to require a release of her right, upon

any sale made by the husband ; which is generally done by her joining with him in the deed, with apt words for that purpose. The claim of dower attaching upon all the lands whereof the husband was seised at any time during the coverture, is, in point of fact, of little or no use, unless the husband dies seised ; for it is in practice, almost universally extinguished, by the act of the wife in concurrence with the husband, upon sales and mortgages of real estate. And since the existence of the title only serves to increase the expense, and multiply the forms of alienation, in several of the states the title to dower is restricted to lands of which the husband died seized. Such is the law of Vermont, New Hampshire, Tennessee, North Carolina, Connecticut and Georgia. In South Carolina the real estate of an intestate is distributed, one-third to the widow in fee, and the residue to his children ; and if the intestate leaves no lineal descendant, nor lineal ancestor, nor brother or sister of the whole blood, or their children, nor brother or sister of the half blood, his widow takes two-thirds of the real estate in fee, and in all other cases, she takes a moiety. In Ohio, the widow is dowable not only of her husband's legal estates of inheritance, but also of one-third part of all the right, title, or interest, that her husband, at the time of his decease, had in any lands and tenements, held by bond, article, lease, or other evidence of claim. But she is held not dowable of an equitable estate which the husband, in good faith, has aliened ; nor of lands purchased by him in his own name with moneys entrusted to him by another. In Georgia, the widow and children of an intestate inherit his estate in equal shares ; and if he dies without issue, she inherits the whole. And in all cases, the widow is bound, within one year from the death of her husband, to elect whether she will take under the will, if any, or the statute of distributions, if there is no will, or will claim her dower ; and if she does not so elect, she will be presumed to have claimed her dower. In Missouri the common law right of dower is extended to leasehold estates for a term of twenty years or more. In Mississippi, if there are no children, nor their issue, the widow has one-half of the land. So in Vermont, Alabama, Arkansas, and Illinois. In Pennsylvania, instead of dower, the widow is admitted to her distributive share of the estate among the heirs ; and if the intestate left issue, she takes one third of the real estate for her life ; if no issue, she takes half, in the like manner ;

and in default of known heirs or kindred she inherits the whole estate, absolutely and forever. In Indiana, the widow of an intestate, in lieu of dower, may in certain cases take in fee, as an heir ; but subject to the claims of his creditors ; her share being one third, or one half, or the whole, according to the circumstances stated in the statute. In Maine, New Hampshire, and Massachusetts, the widow is not dowable of land in a wild state unconnected with any cultivated farm, on the principle that the land would be wholly useless to her, if she did not improve it ; and if she did, she would expose herself to disputes with the heir, and to forfeiture of the estate for waste. If such land should be sold by the husband during coverture, subdued and cultivated by the purchaser, before the husband's death, yet the widow has no right to dower in it, on the principle that the husband was never seised of any estate in the land of which the widow could be endowed. In Pennsylvania, the title dower, does not apply to lands of the husband sold on judicial process, before or after the husband's death, nor lands sold under a mortgage executed by the husband alone during coverture. In Tennessee, the restriction upon the widow's dower, is substantially the same ; and in Missouri, it would seem to be subject generally to the husband's debts ; whereas in North Carolina and Indiana, the widow's dower is declared by statute to be paramount to the claims of creditors. (See 4 Kent, 42 ; 1 Greenl. Cruise, 165, 166, *note*.)

"It is well settled in the English cases," says Kent (4 Kent Com. 43) "that the wife of a *cestui que trust* is not dowable in equity out of a trust estate, though the husband is entitled to his curtesy in such an estate. A widow is consequently not dowable in her husband's equity of redemption ; and this anomalous distinction is still preserved in the English law, from the necessity of giving security to title by permanent rules. This policy out-weighs the consideration that would naturally be due to consistency of principle. Sir Joseph Jekyll, in *Bank v. Sutton*, 2 P. Wm. Rep. 700 ; held, that the widow might be endowed of an equity of redemption, though the mortgage in fee was executed before the marriage, upon her paying the third of the mortgage money, or keeping down a third of the interest. But the reasoning of that learned judge, did not prevail to establish his doctrine, and the distinction which he suggested between the case of a trust created by the husband himself, and a trust es-

tate which descended upon, or was limited to him, has been condemned by his successors, as loose and unsound. The same rule prevails as to an equity of redemption in an estate mortgaged in fee, by the husband before marriage, and not redeemed at his death. In these United States, the equity of the wife's claim has met with a more gracious reception; and in Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, Tennessee, Alabama, Mississippi, Indiana, and probably in most or all of the other States, the wife is held dowerable of an equity of redemption. Though the wife joins with her husband in the mortgage, and though the husband should afterwards release the equity, the wife will be entitled, at his death to her dower in the lands subject to the mortgage; and if they are sold under the mortgage then to her claim as for dower, in the surplus proceeds, if any there should be. If however the mortgage was executed on a purchase before the marriage, and the husband releases the equity after the marriage, his wife's right of dower is entirely gone; for it never attached, as the mortgage was executed immediately on receiving the purchaser's deed. In the cases of *Harrison v. Eldridge*, 2 Halst. Rep. 392, and *Barker v. Parker*, 17 Mass. Rep. 564, the wife's interest in the equity of redemption, in a mortgage executed by her and her husband, was held not to be sold by a sale of her husband's equity, under an execution at law against him only; and the purchaser at the sheriff's sale, took the land, subject to the widow's dower. These cases present a strong instance of the security afforded to the wife's dower in the equitable estate of her husband. But if the mortgagee, in such a case, enters under a foreclosure, or after forfeiture of the estate, and by virtue of his rights as mortgagee, the wife's dower must yield to his superior title; for as against the title under the mortgage, the widow has no right of dower, and the equity of redemption is entirely subordinate to that title. The wife's dower in an equity of redemption only applies in case of redemption of the encumbrance by the husband or his representatives, and not when the equity of redemption is released to the mortgagee, or conveyed. The reason of the American rule giving dower in equities of redemption, is, that the mortgagor, so long as the mortgagee does not exert his right of entry, or foreclosure, is regarded as being legally, as well as equitably seised in respect to all the world, but the mortgagee and his assigns. Even in the view

of the English courts of equity, the owner of the equity of redemption is the owner of the land, and the mortgage is regarded as personal assets. The rule in several of the States is carried to the extent of giving to the wife her dower, in all trust estates. This is said to be the law in New Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Mississippi, Ohio, Illinois, and Alabama; but the rule in those States, must be understood to be limited in the case of trusts in which the husband took a beneficial interest. It could not be applied to trust estates in which the husband was seised in fee of the dry technical title, by way of trust or power for the sole interest of others. In all the other States except those which have been mentioned, and except Louisiana, where the rights of married women are regulated by the civil law, and except also Georgia, where tenancy in dower is said to be abolished; the strict English rule on the subject of trust estates, is presumed to prevail. Though the wife be dowerable of an equity of redemption, she is, after her husband's death, if she claims her dower, bound to contribute ratably towards the redemption of the mortgage. If the heir redeems, she contributes by paying, during life, to the heir, one third of the interest on the amount of the mortgage debt paid by him, or else, a gross sum, amounting to the value of such an annuity. In England, the widow entitled to dower in an equity of redemption in a mortgage for years, has also, upon the same principles applicable to that analogous case, the right to redeem, by paying her proportion of the mortgage debt, and to hold over, until she is reimbursed. As to the interest of a widow of a *mortgagee*, the case and the principles applying to it, are different. A mortgage before foreclosure, is regarded by the courts in this country, for most purposes, as a chattel interest; and it is doubted whether the wife of the mortgagee who dies before foreclosure, or entry on the part of her husband, though after the technical forfeiture of the mortgage at law, by non-payment at the day, be now, even at law, entitled to dower in the mortgaged estate. The better opinion is, that she would not be entitled, as against the mortgagor. The New York Revised Statutes, have settled this question in New York, by declaring that a widow shall not be endowed of lands conveyed to her husband by way of mortgage, unless he acquired an absolute estate therein, during the marriage."



8. *Lease.*

In England, long terms, as for one hundred, or five hundred, or a thousand years, created by way of trust to secure jointures, and raise portions, or money on mortgage for family purposes, and made attendant upon the inheritance, occupy a large space in the law; and the practice prevails of keeping outstanding terms on foot, to attend and protect the inheritance, after the performance of the trusts for which they were raised.

It has been stated that after the conquest, the demesnes of the lords of manors were generally cultivated by their villeins to whom small portions of lands were allotted for their support and maintenance to be held at the mere will of the lord. But as to those persons whose condition was free, it became customary to grant them lands, for a certain number of years, to be held in consideration of a return of corn, hay, or other portion of their crops; by which they acquired a certain interest in their lands though much inferior to an estate of freehold.

Leases for years were originally held by a very precarious tenure. The term was liable to be defeated at the pleasure of the tenant of the freehold, by his suffering a common recovery, the possession of the lessee being the possession of the owner of the freehold. In the reign of Henry VI., the law gave to the lessee who was unduly evicted, the right to recover, not only damages for the loss of the possession, but the possession itself. But, until the statute of 21 Henry VIII. c. 15, removed the doubts arising from the conflicting authorities, and enabled the lessee for years to falsify a recovery suffered to his prejudice the interest of the lessee continued insecure. A term then became a certain and permanent interest, and long terms were common when they could be purchased and held in safety. Prior to the reign of Elizabeth, there was nothing in the books respecting terms attendant upon the inheritance. In the latter part of her reign, mortgages for long terms of years, came into use; and then it was deemed in chancery advisable to keep the term outstanding, to wait upon, and protect the inheritance. In modern times, a long lease has been considered a muniment of title, and equivalent, in some respects, to an estate in fee.[1]

[1] In Massachusetts, it is provided that a term originally created for a hundred years or more, and of which fifty remain unexpired, shall have all the incidents

"In this country" says Kent, (4 Kent Com. 93) "we have instances of long terms of near one thousand years; but they are treated altogether as personal estate, and go in a course of administration as chattel interests, without any suggestion of their being of the character of attendant terms. Our registry acts, applicable to mortgages and conveyances, determine the rights and title of *bona fide* purchasers and mortgagees, by the date and priority of the record; and outstanding terms can have no operation when coming in collision with a registered deed. We appear to be fortunately relieved from the necessity of introducing the intricate machinery of attendant terms, which have been devised in England with so much labor and skill, to throw protection over estates of inheritance. Titles are more wisely guarded, by clear and certain rules, which may be cheaply discovered, and easily understood; and it would be deeply to be regretted if we were obliged to adopt so complex and artificial a system, as a branch of the institutes of property law. In New York, under the *revised statutes* relative to uses and trusts, these trust terms cannot exist for the purposes contemplated in the English equity system. All trusts, except those authorized and modified by the statute, are abolished; and express trusts may be created to "sell lands for the benefit of creditors, and to sell, mortgage, or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon, and to receive the rents and profits of land to be applied to the use of any person; and the trustees cannot sell, convey, or do any other act in contravention of the trust; and when the purposes for which the express trust shall have been created, have ceased, the state of the trustees ceases also. This strict limitation of the power of creating and continuing trusts, would, in its operation, have totally destroyed these attendant terms, had they otherwise existed in New York."

Among the Romans, leases were usually of very short duration, as the *quinquennium*, or term for five years; and this is said to have been the policy and practice of France, Switzerland, and China—a policy which has been condemned by some writers as discouraging agricultural enterprise and costly improve-

of a fee simple. So in Vermont, the owners of long terms are invested with some of the privileges of freeholders. And in Ohio, lands held by permanent leases are treated as real estate, in regard to judgments, and executions. But a term for ninety-nine years is to be sold on execution, as a chattel.

ments. By the present constitution of the State of New York, no lease or grant of agricultural land, for a longer period than twelve years, in which is reserved any rent or service of any kind, is valid. Const. Art. 1 sec. 14.

### 9. *Mortgage.*

In England, it is the established doctrine, that if there be three mortgages in succession, and all duly registered, or a mortgage, and then a judgment, and then a second mortgage upon the estate, the junior mortgagee may purchase in the first mortgage, and tack it to his mortgage and thus force out the middle mortgage and gain preference over it. The same rule would apply, if the first, as well as the second encumbrance, was a judgment; but the encumbrancer who tacks must always be a mortgagee, for he stands in the light of a *bona fide* purchaser, parting with his money upon the security of the mortgage. An English writer (Mr. Humphreys) thus forcibly presents this system:—

“The first principles of property, would assign effect to every security, according to its priority of date: from that moment, the land, to the extent of the charge, is no longer in the mortgagor's power, but belongs to the incumbrancer; and such is actually the case, where the charges are all of one character, either legal or equitable. The artificial distinction however, between these two species of interests, has introduced a correspondent one into mortgages, under the term of *tacking*, which is often subversive of the above just rule. That a first mortgagee, holding the title deeds, not having notice of a second mortgage, may make a further advance on the credit of his original security is incontestable. It was incumbent on the second mortgagee, when the deeds were not forthcoming, to seek out their possessor, and give him notice. That rule, however, is of a far different character, by which an estate being mortgaged to two in succession, the second mortgagee, if he had no notice of the prior charge, when he advanced his money, may, by getting an assignment or declaration of trust of any outstanding judgment, term of years, or other legal interest, anterior to the first mortgage, tack his subsequent incumbrance to this anterior interest, and thus take precedence of the first mortgage. Nor does it vary the case, if the subsequent incumbrancer, after having advanced his money, has notice of the first mortgage, when he

gets in the prior legal estate ; or even if it be done *pendente lite*, in an equity suit, so it be before the decree. This privilege of tacking, is however confined to a mortgagee, and not allowed to a judgment creditor ; on the ground that the latter, though he acquires a lien on the land, by his judgment, does not advance his money on the immediate credit of the debtor's real estate ; since he has other remedies ; viz. the goods and the body. The reverse case however, of a first mortgagee lending a further sum on judgment, and thereby excluding an intermediate mortgage, of which he has not notice, is admitted, on the rather refined presumption, that he made the further advance as knowing he had a hold of the land by the mortgage ; and the judgment, though it passed no present interest in the land, yet formed a lien upon it. In one instance, first and third securities, have been allowed to be tacked, to the exclusion of an intermediate one, in violation of a principle established by courts of equity themselves ; namely, that the incumbrancer, getting in a prior charge, must, in order to exclude the second mortgagee, have made his further advance on the security of *the property charged*. The instance alluded to, is where two estates, being subject to a prior incumbrance, the owner mortgaged both of them to A., and then mortgaged only one of them to B. The last incumbrancer, on getting in the preceding charge, was allowed to hold both estates, against the former mortgagee, although he advanced his money on the credit of one estate only, without having contemplated the other estate, not even to the extent of acquiring a general lien by a judgment."

The doctrine of tacking is entirely exploded throughout the United States ; our statutes for registering deeds having superseded the English rules on this subject. The equitable rule which the English courts profess to follow, we in fact observe :— "*Qui prior est tempore, potior est jure*." It is the policy, and meaning of our registry acts, that liens are to be paid according to the order of time in which they respectively attached ; and consequently, all incumbrancers are to be made parties to a bill to foreclose, that their claims may be chargeable in due order. In the English law, the rule is under some reasonable qualification, it is true. The last mortgagee cannot tack, if when he took his mortgage he had notice in fact of the intervening incumbrance. But if he acquired that knowledge subsequent to the time of taking his mortgage, he may then purchase and

tack, though he had notice at the time of his purchase, and though there was even a bill then pending by the second mortgagee to redeem. The assumed equity of the principle is, that the last mortgagee, when he lent his money, had no notice of the second incumbrance; and the equities between the second and third incumbrancers being equal, the latter, in addition thereto, has the prior legal estate or title, and he shall be preferred. There is however no natural equity in tacking, and when it supersedes a prior incumbrance, it works manifest injustice. By acquiring a still more antecedent incumbrance, the junior party acquires, by substitution, the rights of the first incumbrancer over the purchased security, and he justly acquires nothing more. "The doctrine of tacking" says Kent, "is founded on the assumption of a principle which is not true, in point of fact; for, as between A. whose deed is honestly acquired and recorded to-morrow, the equities upon the estate are not equal. He who has been fairly prior in point of time, has the better equity, for he is prior in point of right." (4 Kent's Com. 178.)

#### 10. *Joint interest in land.*

In England, where several persons own land together, they are joint tenants, unless there is some special reason for a different ownership; but in this country, in the absence of such reason, they are tenants in common.

The common law favored title by joint tenancy, on account of the right of survivorship. Its policy was averse to the division of tenures, because it tended to multiply the feudal services, and weaken the efficacy of that connection. But it has been said, that the reason of that policy had ceased with the abolition of tenures and that even the courts of law were no longer inclined to favor joint tenancy.

Blackstone says: "If an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes them immediately joint tenants in fee of the lands. Now, in the majority of instances of persons purchasing land together, they would prefer not to be joint tenants, but tenants in common. It is evident that the land ought to follow what is the common wish of parties, in every case where this intention is not expressly declared, and in every case of a con-

veyance of land to several persons, should make them tenants in common, unless the conveyance expressly stated a different intention. The making the rule of construction different from the common understanding of the words, is a frequent source of litigation which is increased by the inclination which the courts, though bound down by this narrow rule, naturally feel to construe all doubtful expressions in favor of tenancies in common.

We, however, have reversed the English rule, upon the ground that tenancies in common are more beneficial, and more consonant with the genius of our government; and the old English doctrine upon this subject, has been not only partially qualified, or subjected to occasional exceptions, but actually reversed, in nearly all the states. In New York, Michigan, Missouri, Delaware, Arkansas, and Illinois, estates in joint tenancy are abolished, except in executors and other trustees unless the estate is expressly declared in the deed or will creating it, to pass in joint tenancy. The New York *Revised Statutes* further declare that every estate vested in executors or trustees, as such, shall be held in joint tenancy. In Massachusetts, Vermont, and Pennsylvania, an exception is made, in regard to trustees alone. In Massachusetts, Maine, and Michigan, another exception from the general provision, is made in relation to *mortgages*; and in Massachusetts, Michigan and Vermont, conveyances to *husband and wife*. While in Rhode Island, conveyances to husband and wife, are expressly declared not to constitute an exception. In Indiana, joint tenancies are changed into tenancies in common. In South Carolina, the death of one joint tenant operates as a severance and his estate passes to his heirs, as in case of a tenancy in common. In Maryland and New Jersey, an estate in joint tenancy can be created only by an express declaration that the land is to be owned in this way. In Maine, New Hampshire, Vermont, Massachusetts and Rhode Island, there must be express words, or an intention to that effect to create a joint tenancy; and in Vermont the statute is declared applicable to estates previously created, as well as those which might arise subsequently. It has been held in Massachusetts, that a conveyance to two or more *in mortgage*, creates a joint tenancy, notwithstanding the statute; on the ground that as, upon the death of one the remedy to recover the debt would survive, it is clearly to be implied that the parties

intended that the collateral security should follow and comport with the remedy. In North Carolina, there is no survivorship between joint tenants, except in the case of partners in business, and here only for the purpose of settling the joint concern. After such settlement, the survivor pays over the balance due to the representatives of the deceased partner. In Virginia and Kentucky, it is provided, that of whatever kind the estate may be, it shall not pass to survivors, but shall descend, may be devised, and shall be subject to debts charges, curtesy and dower, and be considered to every other intent and purpose, in the same manner, as if it had been a tenancy in common. The statute of Virginia, abolishing survivorship has been held to extend to partnership property, as well as all other. In most of the statutes turning joint tenancies into tenancies in common, it is declared that the law shall apply as well to existing joint tenancies, as to those afterward to be created. But it is held that the statutes have this effect without its being expressly so declared; the land being beneficial by rendering the tenure more certain and valuable. (See 1 Hilliard on Real Property; 1 Greenl. Cruise, 353, *note*.)

#### 11. *Descent.*

There is a very wide difference between the English and American law, with regard to descents. The English law of descents is governed by a number of rules or canons of inheritance, which have been established for ages, and have regulated the transmission of the estate, from the ancestor to the heir, so that all uncertainty as to the course which the descent is to take, is entirely precluded. But in the United States, the common law is nearly extirpated by statutes which have adopted principles not only different from, but in most cases, wholly subversive of it. And those statutes are not the legislative acts of the nation, but of as many legislatures as there are states; every legislative act on this subject differing, in some respects, from any other. On this subject, Chief Justice Reeve, remarks "The condition of the United States, as it respects the descent of real property, is peculiar. In other nations, the law of descent is uniform, subject indeed to special customs in particular places, varying the general law of the land. But this nation has no common law, upon the subject of descents. Some of the colonies at their first settlement, passed laws regulating the descent

of real property on principles altogether different from the common law of England; whilst most of the colonies retained the common law of the parent country. In some of those colonies however, which at first retained this branch of the common law of England, essential alterations were made, even prior to the revolutionary war. After the revolution, the several States composing the confederacy, enacted laws regulating the transmission of real property by descent, not only differing from, but utterly opposed to the common law of England. The English common law of descent, had its foundation in principles of feudal policy, in no measure applicable to the existing state of things in this country, and calculated to cherish an aristocratic spirit, hostile to our republican forms of government. When we became a nation, we found ourselves divided into a number of distinct, separate sovereignties, each possessing the power to enact laws affecting the property within its own jurisdiction, with which the national government, binding all the States together, with political bands, had not the remotest concern. Having rejected the English law of descents, each State passed laws to regulate the descent of real property for itself; all of them differing greatly, from this branch of the common law of England, and each State differing from the others." (*Reeves' Treatise on the Law of Descents*, Pref.)

For the purpose of exhibiting, more fully, the nature of the alterations in the law of descents which have been made in this country, it will be well to compare our laws with Blackstone's Canons of Descent.

His first canon is, "that inheritances shall lineally descend to the issue of the person who last died actually seized, *in infinitum*; but shall never lineally ascend. (2 Bl. 208.)

As the first part of this rule prevails in this country, we need only speak of the latter clause which contains one of the most unreasonable provisions of the English law. By it, a father or mother can never become heir to a son, but the estate shall, in preference, descend to the most remote collateral relation, and even escheat to the lord. This rule however Blackstone tries to defend, and asserts that it is founded "on good legal reason." But his arguments only show the reasons for introducing it into the feudal law, and do not afford any justification for its continuance. He says, "The total exclusion of parents, and all lineal ancestors, from succeeding to the inheritance of their off-



spring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow, and raised up seed to his brother. And by the laws of Rome, in the first place, the children, or lineal descendants were preferred; and, on failure of these, the father and mother, or lineal ascendants succeeded, together with the brethren and sisters; though by the law of the twelve tables, the mother was originally, on account of her sex, excluded. Hence, this rule of our laws has been censured, and declaimed against, as absurd, and derogating from the maxims of equity and natural justice. Yet that there is nothing unjust or absurd in it, but that on the contrary, it is founded upon very good legal reason, may appear, as well from considering the nature of the rule itself, as the occasion of introducing it into our laws. We are to reflect, in the first place, that all rules of succession to estates, are creatures of the civil polity, and *juris positivi*, merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the present possessor: after which, the land, by the law of nature, would again become common, and liable to be seized by the next occupant; but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession, is continued and transmitted from one man to another, according to the rules which each State has respectively thought proper to prescribe. There is certainly therefore, no injustice done to individuals, whatever be the path of descent marked out by the municipal law. If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of the feudal tenures. For it was an express rule of the feudal law, that *successionis feudi talis est natura, quod ascendentes non succedunt*; and therefore the same maxim obtains also, in the French law, to this day. Our Henry the First, indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line; but this soon fell again into disuse; for so early as Glanvils' time, who wrote under Henry the Second, we find it laid down, as established law, that *hære-*

*ditas nunquam ascendit* ; which has remained an invariable maxim ever since. These circumstances, evidently show this rule to be of feudal original ; and taken in that light, there are some arguments in its favor, besides those which are drawn, merely from the reason of the thing. For if the feud of which the son died seised, was really *feudum antiquum*, or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son ; unless it were *feudum maternum*, or one descended from his mother, and then, for other reasons, the father could, in no wise, inherit it. And if it were *feudum novum*, or one newly acquired by the son, then only the descendants from the body of the feudatory himself, could succeed, by the known maxim of the early feudal constitutions ; which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum*, were held by the son, *ut feudum antiquum*, or with all the qualities annexed to a feud descended from his ancestors, such feud must, in all respects have descended, as if it had really been an ancient feud ; and therefore could not go to the father, because, if it had been an ancient feud, the father must have been dead, before it could have come to the son. Thus, whether the feud was strictly *novum* or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases, the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton, adopted by Sir Edward Coke, which regulates the descent of lands according to the laws of gravitation." (2 Bl. Com. 211.)

"The admission of the father to the inheritance of his children dying intestate," says Kent (4 Kent Com. 395) "and without lineal descendants, is an innovation, and a very great improvement, upon the English common law doctrine of descents. The total exclusion of parents, and all lineal ancestors, in such a case, is said to be peculiar to the English law, and to those of other nations which have been deduced from the feudal policy. Sir Martin Wright has labored to vindicate the English rule on the feudal theory, by a train of artificial and technical reasoning,

which has no manner of foundation in the principles of justice. So far as the feud was presumed to be *antiquum aut poternum*, it was deemed to have passed already through the father, and therefore he could not succeed. It would be repugnant to the fiction; and the rights of the father, as it seems, must be sacrificed to sustain it. The heir was also bound to show himself entitled by a regular course of descent, from the first feudatory or purchaser; and the best evidence of that which the case afforded, was to prove that he was heir of the whole blood to the person last seized. The very artificial nature, and absurd results, of the English rule, are strikingly illustrated by the well known case stated by Littleton, that though the father never can be heir to his son, for the inheritance never can ascend, and the uncle, or father's brother, though in a remoter degree, will have the preference; yet if the uncle should die intestate without issue, the father, as heir to the uncle, may succeed to the inheritance of his son; for says Littleton, he cometh to the land, by collateral descent, and not by lineal ascent. So it has been held that if either parent, stood in the relation of cousin to the son, they would inherit in that character, though not as father or mother."

In the United States, the right of the father and mother to become heirs to their children, is fully established. If the owner of lands dies without lawful descendants, leaving parents, the inheritance ascends to them, either first to the father, and next to the mother, or jointly, under certain qualifications. In New York, Virginia, Maine, New Hampshire, and Kentucky, the estate goes to the father, unless it came to the intestate on the part of the mother, and then it passes to her, or the maternal kindred. In Massachusetts, if the intestate leaves no lawful descendants, the estate invariably goes to the father. In Vermont, the widow, where there are no issue, has one half of the estate, and the father the other half. In Georgia, in default of issue, the estate goes to the father as one of the next of kin with the brothers and sisters; or if the father be dead, the widow takes the whole estate, real and personal. In Maryland, if the estate was acquired by descent, it goes to the parent or kindred, in the paternal, or maternal line, from which it descended. If otherwise, in default of issue, and of brothers and sisters of the whole, and of the half blood, it goes to the father only; if there is no father, then to the brothers and sisters of the blood of the father, and

their representatives, and if none, then to the grandfather and his descendants. If that line fails, then in like manner to the mother and her descendants, and maternal ancestors. In Louisiana, the father and mother succeeds equally, as next of kin, to a moiety of the estate of the child dying intestate, and without issue. The other moiety goes to the brothers and sisters, and their descendants. If only one parent survives, that parent takes one fourth. In Indiana, in default of issue, the father, and if dead, the mother takes one half of the estate, and the other half is equally divided among the brothers and sisters, or their descendants. If no parents, the brothers and sisters, or their descendants, take the whole. If none of them, and the parents be living, then the whole estate goes to the father, or if dead, to the mother. In Illinois, in default of issue and their descendants, the whole personal, and one half of the real estate, goes to the widow, and the residue, or the whole, if there be no widow, to the parents, brothers, and sisters, and their descendants, in equal parts, and if only one of the parents be living, that parent takes, as survivor, a double portion. If there be no widow, or parent, or brothers, or sisters, or their descendants, then the estate descends, in equal parts, to the next of kin in equal degree, computing by the rules of the civil law. In New Jersey, brothers and sisters of the whole blood and their children, take the inheritance in default of lineal heirs, in preference to the parents, or either of them. But in default of such brothers and sisters, and their issue, the estate goes to the father in fee simple, and if no father, to the mother for life, and after her death, to the brothers and sisters of the half blood. In Mississippi, the mother in the foregoing case, takes a fee, and the half blood takes equally with the whole blood, unless there are kindred in the same degree, and then the whole blood are preferred. In Missouri, the parents take equally with the brothers and sisters of the intestate. In Pennsylvania, the father and mother, take jointly for life, and for the life of the survivor, and if there are no issue, or brothers, or sisters, or descendants of the whole blood, the father and mother, if both be living, and if not, the survivor takes an estate in fee. In North Carolina, the parents, or the survivor of them, take for life only, in default of issue, and of brothers and sisters. In South Carolina, in default of issue, or widow (who takes a third, or moiety, or two thirds of the estate, as the case may be,) the father, or if dead, the mother takes the

estate, real and personal, in conjunction with the brothers and sisters, in equal shares. In Delaware, the parents are postponed to the brothers and sisters, and their descendants; and in default of brothers and sisters the estate is distributed equally to every of the next of kindred to the intestate, who are in equal degree. (See 4 Kent. Com. 392.)

Blackstone's second canon, is, that, "the male issue, shall be admitted, before the female;" and his third, that "where there are two or more males in equal degree, the eldest only shall inherit; but the females altogether."

"The preference of males to females, and the right of primogeniture among the males, is the established and ancient rule of descent, in the English common law. The right of primogeniture was derived from the martial policy of the feudal system, after it had attained solidity and maturity. It is supposed to have been unknown, or not in use, among the ancient Germans, or the Anglo Saxons, prior to the Norman conquest. They admitted all the sons equally to the inheritance; but the weight of authority is, that females were most generally excluded, even in the primitive ages of the feudal law. When the feudal system became, firmly established, it was an important object to preserve the feud entire, and the feudal services undivided, and to keep up a succession of tenants who were competent, by their age and sex, to render the military services annexed to their grants. The eldest son, was the one that first became able to perform the duties of the tenure, and he was, consequently preferred in the order of succession. Females were totally excluded not only from their inability to perform the feudal engagements, but because they might, by marriage, transfer the possession of the feud to strangers and enemies." (4 Kent Com. 382, 383.)

But these common law doctrines of descent, are incompatible with our free institutions; and the following rule of inheritances, prevails among us. If a person owning real estate, dies seised, or as owner, without devising the same, the estate shall descend to his lawful descendants in the direct line of lineal descent; and if there be but one person, then to him or her alone; and if more than one person, and all of equal degree of consanguinity to the ancestor, then the inheritance shall descend to the several persons as tenants in common, in equal parts, however remote from the intestate, the common degree of consanguinity may be. The foregoing rule, which is in favor of

the equal claims of the descending line, in the same degree, without distinction of sex, and to the exclusion of all other claimants is in force in all the United States, except that in South Carolina, the widow takes one third of the estate in fee, and in Georgia, she takes a child's share in fee, if there be any children, and if none, she then takes a moiety of the estate, and in South Carolina and Georgia, the whole estate. "In Massachusetts, the statute law of descents applies only to estates whereof the ancestor died seised in fee simple, or for the life of another, and the descent of estates tail, is limited to the eldest male heir. In Rhode Island, New Jersey, North and South Carolina, Tennessee and Louisiana the claimants take, in all cases, *per stirpes*, though standing in the same degree. In Alabama, the descendants of children also take *per stirpes*; and in Tennessee, the male issue is preferred to the female in the descent of real property." (4 Kent Com. 375.)

Though primogeniture, and the preference of males, are now thus universally given up in this country, yet in some states, they remained in full force, and in others, modifications of them continued, for a long period. The common law, with regard to descents, prevailed in New Jersey until 1780; in Maryland and South Carolina, until 1786; and in Virginia, until 1787. In Massachusetts, Rhode Island, and Connecticut, the eldest son in imitation of the Jewish law had formerly a double portion of the real and personal estate, and in Delaware, of the real estate of his father. And male children in Vermont inherited, twice as much of their father's real estate as females.

The fourth canon is, "that the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living."

In this country, the lineal descendants, except as already stated, are admitted to an equal portion of the inheritance, if they all stand in equal degree to the common ancestor. The civil law, adhered strictly to the doctrine of representation, and gave to the grand-children, and other remoter descendant's though all the claimants were standing in equal degrees, the portion only, that their parent would have taken, if living. In some of the states, as New York, North Carolina, Tennessee, Pennsylvania, Virginia, and Kentucky, it appears to be allowed in favor of the most remote collateral relations. In most of the

other states, though representation is without limit in the direct descending line, in the collateral, it does not extend beyond brothers and sisters children, as in Maine, New Hampshire, Vermont, Rhode Island, Connecticut, Pennsylvania, Maryland, Georgia, and Mississippi; nor in Delaware after brothers and sisters grand-children; nor in Alabama and Mississippi, after the descendants of brothers and sisters; and in some of the states, as in New Jersey, there does not appear to be any positive provision for the case. In Louisiana, representation is admitted in the collateral line, in favor of the children and descendants of the brothers and sisters of the deceased. In North Carolina, the claimants take *per stirpes*, in every case, even though the claimants all stand in equal degree of consanguinity to the common ancestor, and so do the descendants of brothers and sisters, by the law of descent in Alabama. The civil law adhered strictly to the doctrine of representation, and gave to the grand-children, and other remote descendants, though all the claimants were standing in equal degrees, the portion only that their parent would have taken, if living. The following rule of inheritance prevails in the United States. If a person dying seised, or as owner of land, leaves lawful issue of different degrees of consanguinity, the inheritance shall descend to the children and grand-children of the ancestor, if any be living, and to the issue of such children or grand-children, as shall be dead, and so on, to the remotest degree, as tenants in common. But such grand-children, and their descendants, shall inherit only such share as their parents respectively would have inherited, if living. This rule applies to every case where the descendants of the intestate, entitled to share in the inheritance, are of unequal degrees of consanguinity to the intestate. Those who are in the nearest degree, take the shares which would have descended to them, had the descendants in the same degree who are dead, leaving issue, been living; and the issue of the descendants who are dead, respectively, take the shares which their parents, if living, would have received. When heirs are all in equal degree, they inherit *per capita*, or equal portions, and when they are in different degrees, they inherit *per stirpes*, or such portion only as their immediate ancestor would have inherited, if living.

Blackstone's fifth rule is, "that on failure of lineal descendants, or issue of the person last seised, the inheritance shall de-

scend to his collateral relations, being of the blood of the first purchaser; subject to the three preceding rules.

In Massachusetts, if there be no lineal descendants, nor father, the estate descends in equal shares to the brothers and sisters, and mother, and to the children of any deceased brother or sister, by right of representation; but if there be no brother or sister living, the estate descends to the mother, in exclusion of the issue, if any, of deceased brothers, or sisters. In New Hampshire, Vermont, and North Carolina, uncles and aunts take equally with the nephews and nieces, as being of equal kin. But in Maine, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Ohio, Indiana, Illinois, Kentucky, Virginia, Tennessee, South Carolina, Georgia, Alabama, Louisiana, Mississippi, and Missouri, nephew and nieces take in exclusion of uncles and aunts.

In many of the states, the descent of real estate is regulated in some measure, by a regard to the mode in which it became the property of the intestate, whether by actual purchase, or by descent, gift, or devise from a paternal or maternal ancestor. If the inheritance was ancestral, and come to the intestate by gift, devise or descent, it passes to the kindred who are of the blood of the ancestor from whom it came, whether it be in the paternal or maternal line, so as to exclude the relations in the adverse line until the other line be exhausted. This is the rule in New York, New Jersey, Ohio, Virginia, Tennessee, North Carolina, Rhode Island, and Connecticut. In Maine, New Hampshire, Vermont, Massachusetts, Pennsylvania, Georgia, Alabama, Mississippi, and Missouri, there does not seem to be any positive distinction.

"The English law, requires the claimant of the inheritance to be heir to the person last seised, and of the blood of the first purchaser. It gives a universal preference on the collateral inheritances, as far as relates to the first purchaser, of the paternal, to the maternal line; and this English doctrine is founded on the technical rule, that it is necessary the heir should show himself to be descended from the first purchaser, or afford the best presumptive evidence, which the case admits, of the fact. The American law of descents does not go on the principle of searching out the first purchaser through the mists of past generations, except the estate be ancestral, and then it stops at the last purchaser, in the ancestral line. Its general object is to continue



the estate in the family of the intestate ; and in effecting it, to pay due regard to the claims of the successive branches of that family, and principally, to the land and paramount claim of proximity of blood to the intestate." (4 Kent Com. 405.)

Blackstone's sixth rule is "that the collateral heir of the person last seized, must be his next collateral kinsman of the *whole blood*."

"The heir," says Blackstone, "need not be the nearest kinsman absolutely, but only *sub modo* ; that is, he must be the nearest kinsman of the *whole blood* ; for if there be a much nearer kinsman of the *half blood*, a distant kinsman of the *whole blood* shall be admitted, and the other entirely excluded ; nay, the estate shall escheat to the lord sooner than the half blood shall inherit." (2 Bl. Com. 227.) Blackstone attempts to defend this absurd rule, or rather apologize for it, on feudal principles, but finally confesses "that it is certainly a very fine spun and subtle nicety," and that "the practice is carried farther than the principle on which it goes will warrant."

This rule for excluding the half blood, so repugnant to every principle of property, and to the moral feelings of kindred, has been abandoned in every part of the United States. In some of the states, no distinction is made in any case, between relations of the whole and the half blood ; and one brother of the whole blood and another of the half blood of an intestate, will inherit equal shares of his estate. In Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, New-York, Illinois, North Carolina, Maryland, and Tennessee, no distinction is made between the whole and half blood, except in some of them, as it respects estates which came to the intestate from some one of his ancestors, a preference being in such cases given to the blood of that ancestor. In Connecticut, New Jersey, Pennsylvania, Delaware, Ohio, Indiana, Maryland, Virginia, Kentucky, South Carolina, Georgia, Alabama, Mississippi, Missouri, and Louisiana, relations of the half blood can inherit, but relations of the whole blood are preferred.

Blackstone's seventh rule is, that "in collateral inheritances, the male stocks shall be preferred to the female, (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near,) unless, where the lands have in fact descended from a female. "Thus," he continues, "the relations on the father's

side are admitted *in infinitum*, before those on the mother's side are admitted at all ; and the relations of the father's father before those of the father's mother, and so on."

Blackstone observes that this rule was established in order to effectuate and carry into execution the fifth rule or principal canon of collateral inheritance, that every heir must be of the blood of the first purchaser. For when such first purchaser was not easily to be discovered, after a long course of descents, it was considered that as a preference had been given to males, by virtue of the second canon, through the whole course of lineal descent from the first purchaser, it was more likely that the lands had descended to the last tenant from his male, than from his female ancestors. The right of inheritance, therefore, first runs up all the father's side, with a preference to the male stocks in every instance ; and if it finds no heirs there, it then, and then only, resorts to the mother's side.

This preference of male stocks is continued in England, throughout all manner of successions ; for if, on default of heirs, on the part of the father, the lands descend to the line of the mother, the heirs of the mother, of the part of her father's side, shall be preferred in the succession before heirs of the part of her mother's side. (Hale's C. L. 330.)

The foregoing rule operates unfairly on the maternal relations in the case of an estate which in fact came to the intestate through that line, and of which he is merely technically a purchaser. The taking the estate from the maternal, and giving it to the paternal line, in such a case, is to make the reason of the rule yield to a technical subtlety. In the United States, though the blood of the first purchaser is regarded in some of the states, in regulating descents, and in some a preference is given to the line of that ancestor from whom the estate came to the intestate, whether by descent, devise, or gift, yet, in the case of estates really and not technically purchased by the intestate, there are few instances in which any preference is given to the paternal relations.

Thus we have given the distinguishing rules of the common law doctrine of descent which, as has been seen, are the converse of those in this country. They may be recapitulated as follows :—preference of males to females ; primogeniture among the males ; the inheritance shall never lineally ascend ; the exclusion of the half blood ; the strict adherence to the doctrine of

succession *per stirpes*; the collateral heir of the person last seized, to be his next collateral kinsman of the whole blood; and kindred derived from the blood of the male ancestors, however remote, to be preferred to kindred from the blood of the female ancestors, however near, unless the land came from a female ancestor.

In England, illegitimate children cannot take by descent, for they have not, in contemplation of law, inheritable blood. Nor can they transmit by descent, except to their own offspring, for they have no other heirs. In New-York, children and relatives who are illegitimate, are denied the capacity to take by descent. But the estate of an illegitimate intestate may descend to his mother; and if she be dead, to his relatives on the part of the mother, the same as if he had been legitimate. In Vermont, Rhode Island, Virginia, Kentucky, Ohio, Indiana, and Missouri, bastards can inherit from, and transmit to, their mothers, real and personal estates. The same principle prevails in Connecticut, Illinois, Maryland, North Carolina, Tennessee and Louisiana, with some modifications. In Maine, New Hampshire, Massachusetts, New Jersey, Pennsylvania, Delaware, South Carolina, Georgia, Alabama and Mississippi, bastards are placed generally under the disabilities of the English common law. In Maryland, illegitimate children, and their issue, are capable in law, to take and inherit real and personal estate from their mother, and from each other, and from the descendants of each other, in like manner, as if born in lawful wedlock. In Illinois, Tennessee and North Carolina, bastards inherit to their mothers, if there be no legitimate child; and in North Carolina, bastard brothers and sisters inherit to each other, if one of them dies intestate and without issue. The mother is excluded. In Louisiana, illegitimate children, if they have been duly acknowledged, they inherit from the mother, if she has no lawful issue; they inherit from the father likewise, if he leaves no wife or lawful heir. The father and mother inherit equally to their illegitimate offspring; and in default of parents, and ascendants and descendants, the estate goes to the natural brothers and sisters of the bastard, and to their descendants.

#### 12. *Will or devise.*

The last mode of conveying real property, is by *devise*, or disposition contained in a person's last will and testament, to take

place at the death of the devisor. The word *devisa*, devise, is derived from divide, and originally meant any kind of division, or distribution of property.

Lands may be devised by will in all the United States ; the English statutes of 32 Hen. 8, and 29 Charles 2, having been imported into this country by our ancestors, and incorporated into our colonial jurisprudence, under such modifications, in some instances, as were deemed expedient.

As a general rule, all persons of sound mind are competent to devise real estate, with the exception of infants and married women. In England, persons attainted of treason, or convicted of felony, are incapable of making an effectual devise ; but not so in the United States. In Ohio, Maryland, Vermont, Illinois and Mississippi, unmarried females are capable of devising their estates at the age of eighteen. In New-York, Connecticut, New Jersey, Virginia, North Carolina, Alabama, Georgia, Kentucky, Tennessee and Mississippi, an infant may devise the *Guardianship of his child*. In Rhode Island and Pennsylvania, the power of appointing a guardian by will is restricted to those fathers who are authorized by law to make a will. In Massachusetts, a married woman may, in all cases, devise and dispose of her estate by will, if the husband endorses his assent thereon. In New Hampshire, a married woman may devise her real estate, but not to affect injuriously the rights of her husband. In Michigan, the same power is given to her, provided the written assent of the husband be annexed to the will and signed, attested and proved. In Pennsylvania, Connecticut, Maine and Illinois, married women are expressly authorized to dispose of their own estates by will, without restriction. And in Ohio, married women are held capable of devising. In Rhode Island, New York, New Jersey Delaware, Virginia, Georgia, Kentucky and Indiana, married women are incapable of devising their lands. But it is conceived that in these states, a testamentary disposition of her estate, by a married woman, made pursuant to a power contained in a marriage settlement, or other ante-nuptial contract, would be enforced as a valid appointment ; their statutes being merely in affirmance of the common law. (See note to 3 Greenl. Cruise, p. 13.)

In England, corporations are excepted out of the statute of wills. In this country, as a general rule, every corporation not expressly disqualified by statute, is capable of taking and hold.

ing real estate, as well by devise as by deed; corporations being deemed "persons" within the meaning of the law. The only restrictions are, that the purpose of the conveyance be not foreign to the objects for which the corporation was created; and that the value of its lands do not exceed the sum or value limited in its charter. (See note to 3 Greenl. Cruise, p. 21.) The New-York Revised Statutes declare that no devise to a corporation shall be valid unless the corporation be expressly authorized to take by devise. In Pennsylvania, corporations cannot take lands without the license of the commonwealth,

In England, it is the settled rule of law, that the testator must be *seised* of the lands devised, at the time of making the will. The devise under the English law, is a species of conveyance; and that is the reason that the devise operates only upon such real estate as the testator owned, and was seized of at the time of making the will. The testator must likewise continue seized at the time of his death. The general rule of the English law, exists in Maine, Connecticut, North Carolina, and Alabama. In the state of New-York, on the other hand, every estate and interest, descendible to heirs, may be devised; and every will made in express terms, of all the real estate, or in any other terms denoting the testator's intent to devise all his real property, is construed to pass all the real estate which he was entitled to devise at the time of his death; and the law is the same in Massachusetts, Vermont, Pennsylvania and Virginia. In the latter, seisin is not requisite to a devise, and a right of entry is devisable. Rights of entry are devisable, even though there be an adverse possession or disseisin; and the will will extend prospectively, and carry all the testator's lands existing at his death, if so evidently intended. This is also the law in Kentucky; and in Ohio every description of property may be devised. (See 4 Kent's Com. 512.)

Formerly, in England, if the testator's name were written by himself, in any part of a will, either at the beginning or at the end, it was considered a sufficient signing within the statute. This was altered by the stat. 7 Will. 4, and 1 Vict. c. 26, ss. 9, 11, 12, which require that the signature be at the foot or end of the instrument. Such is likewise the law in New-York, Pennsylvania, Ohio, and Arkansas.

As a general rule, it is not necessary that the will be signed by the party himself. The signature may be made by another

person, in the testator's presence, and by his express direction. But in Pennsylvania, it is required that the will be, in all cases, signed by the testator himself unless "he shall be prevented by the extremity of his last sickness;" in which case the necessity for signing by the hand of another, must be proved by two witnesses, and the act be shown to have been done by his express direction. (8 Watts & Serg. Rep. 25.) In Arkansas, when the will is signed by the hand of another, the person so doing must be one of the attesting witnesses, and must state that fact in the attestation.

By the English statute of frauds, it is essential to the validity of a devise, that it be attested and subscribed, in the presence of the testator by at least three witnesses. Three witnesses, as in the English statute of frauds, are required in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, New Jersey, Maryland, South Carolina, Georgia, Alabama, and Mississippi. Two witnesses only are requisite, in New-York, Delaware, Virginia, Ohio, Illinois, Indiana, Missouri, Tennessee, North Carolina, and Kentucky. In Pennsylvania, a devise of lands in writing will be good, without any subscribing witnesses, provided the authenticity of it can be proved by two witnesses; and if the will be subscribed by witnesses, proof of it may be made by others. (See 4 Kent's Com. 514.)

The English statute of frauds required the will to be signed by the devisor, and to be attested and subscribed by the witnesses *in the presence of the testator*; and this direction has been extensively followed in the statute laws of the United States. The New-York Revised Statutes drop the direction in the English statute, that the witnesses are to subscribe *in the presence of the testator*. The testator, when he signs or acknowledges the will, is to declare the instrument to be his last will; and he is to subscribe or acknowledge the will in the presence of each witness; and the witnesses are to subscribe their names, at the request of the testator.

A will made in a foreign country, of lands situate in England, must be executed in the same manner, and attested by the same number of witnesses as a devise of lands made in England. The rule that a devise of lands, to be valid, must be made according to the *lex rei sitæ*, is in force in Maine, New Hampshire, Delaware, Rhode Island, Indiana, and Missouri. In several other states a contrary rule is adopted.

### 13. *Alienation of Property.*

Under the term alienation, is comprised every method whereby estates are voluntarily resigned by one person, and accepted by another. "The alienation of property, is among the earliest suggestions flowing from its existence. The capacity to dispose of it, becomes material to the purposes of social life, as soon as property is rendered secure and valuable, in the progress of nations, from a state of turbulence and rudeness, to order and refinement. The power of alienation is a necessary consequence of ownership, and it is founded on natural right." (4 Kent's C. 441.)

In the time of the Saxons, an unlimited power of alienation seems to have existed in England. But upon the settlement of the Normans, and the establishment of the feudal law, all lands became unalienable; and during the reigns of William I. and his sons, the doctrine of non-alienation, was for various reasons, strictly enforced. The greater part of the lands throughout the kingdom, had been distributed among the Norman barons, as strict and proper feuds, upon condition of military service; and jealousy prevailing against all those who were of Saxon origin, least they should attempt to re-instate themselves in their ancient possessions, great care was taken during that period, that all the vassals of the crown, who could alone be depended on in case of any insurrection should be in a situation to perform their military services. The genius of the feudal system was originally so strong in favor of restraint upon alienation that by a general ordinance mentioned in the *Book of Fiefs*, (Lib. 2, tit. 55,) the hand of him who knowingly wrote a deed of alienation, was directed to be struck off. It was a violent and unnatural state of things, and contrary to the nature and value of property, and the inherent and universal love of independence.

The first step towards a liberty of alienation was that by which the tenant was permitted to alien with the consent of his lord, and this tended to leave the heir dependent upon the ancestor. This law was adopted from the maxims which then prevailed on the continent; and gave rise to fines for alienation. But in England, the tenant could not dispose of his land, even with the consent of his lord, unless he had also obtained that of his next heir. It was therefore common in ancient feoffments, to express that the alienation was made with the consent of the feoffor's heir. (2 Cruise, p. 5.) The power of alienation was further extended by a law of Henry I. ch. 70, which allowed

every person to dispose of such lands as had been purchased by himself. At this time, it was generally speaking lawful for a person to alien a reasonable part of his land, by inheritance, or purchase; and if he had no heirs of his body he might alien the whole of his purchased lands. If however, he had a son and heir, he could not disinherit him, and alien the whole, even of his purchased lands. The restraint was almost absolute when the tenant was in by descent, and quite relaxed when he was in by purchase. The next alienation in favor of the tenant was in the reign of Henry II. He then had the right to alien without the lord's license, when the grant was to him, his heirs and assigns. The tenant gained successively the power of alienation, if the grant was only to him and his heirs, and the power to charge and encumber the land. The lord's right was still further affected by acts of parliament and judicial determinations, and as early as the reign of Edward III. made subject to the dower of the wife. At length, upon the restoration of Charles II. tenure by knight service, with all its oppressive incidents, was abolished by statute, and the tenure of land was, for the most part, turned into free and common socage, and everything oppressive in that tenure was also abolished. (See 2 Greenl. Cruise, p. 5, 6; 3 Kent's Com. 507, 508.) "The statute of 12 Charles II.," says Kent, *ib.* "essentially put an end to the feudal system in England, although some fictions (and they are scarcely anything more) founded on the ancient feudal relation and dependence, are still retained in the socage tenures."

Every citizen of the United States, is competent to take and holds lands, by descent, devise, or purchase; and every person capable of holding lands, except idiots, persons of unsound mind, and infants, and seized of, or entitled to any estate or interest in land, may alien the same at his pleasure, under the regulations prescribed by law. (4 Kent, 445.)

"The general policy of this country" says Kent, (4 Kent, 17;) "does not encourage restraints upon the power of alienation of land; and the New York Revised Statutes have considerably abridged the prevailing extent of executory limitations. The capacity of estates tail in admitting remainders over, and of limitations to that line of heirs which family interest or policy might dictate, renders them still beneficial in the settlement of English estates. But the tenant in tail can alien his lands, and the estate tail can only be rendered inalienable during the set-



tlement on the tenant for life, and the infancy of the remainderman in tail. Executory limitations went further, and allowed the party to introduce at his pleasure any number of lives, on which the contingency of the executory estate depended, provided they were lives in being at the creation of the estate ; and to limit the remainder to them in succession, and for twenty-one years afterwards. This was the rule settled by Lord Chancellor Nottingham, in the great case of the duke of Norfolk ; and the decision in that case, has been acquiesced in uniformly since that time, and every attempt to fetter estates, by a more indefinite extent of limitation, or a more subtle aim at a perpetuity has been defeated. But the power of protracting the period of alienation has been restricted in New York, to the lives of two persons in being, at the creation of the estate.

#### 14. *Modes of conveyance.*

A great improvement in the law of real property in this country, is in using simple and direct modes of conveyance. The most common mode of conveyance in England, is by lease and release, which possesses over a feoffment, the advantage of not requiring the formality of livery of seizin, and over deeds of bargain and sale, of not needing enrolment. It was contrived by Sergeant Moore, at the request of Lord Norris, for a particular case, and to avoid the unpleasant notoriety of livery and attornment, to the end that some of his kindred might not know, by any search of public records, what settlement he should make of his estate. The lease and release, when used as a conveyance of the fee, have the joint operation of a single conveyance. The first step was to create a small estate, as a lease for a year, and vest possession of it, in the grantee. In a lease at common law, actual entry was requisite to vest the possession, and enable the lessee to receive a release of the reversion. To avoid the necessity of actual entry, the lesser estate was created by a bargain and sale under the statute of uses, and founded on a nominal pecuniary consideration. The bargain raised the use, and the statute immediately annexed the possession to the use ; and the lessee being thus in possession by the operation of the statute, was enabled to receive a release of the reversion. The release was a conveyance at common law, and operated by way of enlargement of the estate ; and thus, by the operation of the lease, by way of bargain and sale, under the statute of uses, and

by the operation of the release at common law, the title was conveyed. (See 4 Kent, 494.)

In the reigns of Henry 6th and Edward 4th, it was not unusual to transfer freehold estates in the following manner. A deed of lease was made to the intended purchaser for three or four years; and after he had entered into possession, a deed of release of the inheritance was executed to him which operated to enlarge his estate into a few simple. When it was found that the statutes of uses transferred the actual possession without entry, the idea of a lease and release was adopted. A bargain and sale for a year, was made by the vendor to the person to whom the lands were to be conveyed; by this, a use was raised in the bargainee, without any enrolment, to which the statute transferred the possession. Thus the bargainee became immediately capable of accepting a release of the freehold and reversion; and accordingly a release was made to him dated the day next after the day of the date of the bargain and sale, all which was considered as equal to a feoffment with livery of seizin. (2 Greenl. Cruise, p. 159, 160.)

"The conveyance, by lease and release," says Kent, (4 Kent, Com. 496) has become the universal mode by which property is conveyed in England, whether by way of sale, mortgage, or settlement. It has this attractive circumstance attending it: it has not the inconvenience and notoriety of livery which is requisite in feoffment; or of enrolment which is required by the statute of 27 Henry 8, in a bargain and sale. It is, therefore, a mode of conveyance well adapted to that secrecy which best accords with the feelings connected with family settlements. It was the mode universally in practice in New York, until the year 1785. The reversion of the statute law of the state at that period, which re-enacted all the English statute law deemed proper and applicable, and which repealed the British statutes in force in New York while it was a colony, removed all apprehension of the necessity of enrolment of deeds of bargain and sale, and left that short, plain, and excellent mode of conveyance to its free operation. The consequence was, that the conveyance by lease and release, which required two deeds or instruments, instead of one, fell immediately into total disuse, and will never be revived."

The common mode of conveyance, in the United States, is a deed in the nature of bargain and sale recorded. This deed

however, is not precisely the English deed of bargain and sale, but derives its operation from the state statutes. When the vendor is seized the legal possession passes to the vendee on the delivery of the deed which is in a very simple and explicit form. In New York, deeds of conveyance of the inheritance or freehold, have the denomination of *grants*; and though deeds of bargain and sale and of lease and release, may continue to be used, they are to be deemed grants. That instrument of conveyance conveys all the estate and interest of the grantor, which he could lawfully convey; and it passes no greater or other interest. (N. Y. R. S. vol. 1 secs. 137, 138, 142, 143.) In Tennessee also, the statutory deed operates as a grant to pass nothing but what the bargainor may lawfully sell, and the title passes, not by force of the statute of uses, but of the registered deed.

In this country all deeds and conveyance of land except certain chattel interests are required to be acknowledged or proved before a magistrate, in the manner prescribed by the local statutes, and afterwards recorded. If not recorded, they are good, and pass the title as against the grantor and his heirs, and devisees, and they are void only as to subsequent *bona fide* purchasers and mortgagees whose deeds shall be first recorded. Notice of the deed by the subsequent purchaser previous to his purchase will countervail the effect of the registry and destroy his pretension as a *bona fide* purchaser.

This subject will be best illustrated by stating more fully the law of some of the states.

In New-York, all conveyances of lands, tenements, and hereditaments, and chattels real, except leases for a term not exceeding three years, must be recorded. (N. Y. R. S. vol. 1, p. 756, sec. 1; ib. 762, sec. 35.) To authorize registration, the deed must be acknowledged, and a certificate of acknowledgment endorsed upon the deed. The deed must be recorded with due diligence; and deeds are to be recorded in the order, and as of the time, when delivered to the clerk for that purpose; and they have effect according to the priority of the registry.

In Massachusetts, a conveyance of any freehold estate, or a lease for more than seven years from the making, is void against all but the grantor, his heirs and devisees, and parties having notice, unless the deed be recorded. (Rev. St. 406, 408; St. 1844, 289.) Acknowledgment by one of two grantors, has been

held sufficient to authorize the registration of a deed. This is upon the ground that the acknowledgment of one grantor justifies the recording of the deed *as his*; and this gives the requisite notoriety *to the whole instrument*. And it is not material whether the grantors are tenants in common or owners in severalty. (*Pidge v. Tyler*, 4 Mass. 541; 9 ib. 218; 5 ib. 438; *Shaw v. Poor*, 6 Pick. Rep. 86.) A second purchaser or creditor having notice, will acquire a good title against the first purchaser, after waiting a reasonable time for the first purchaser to record his deed; because he may fairly presume that in some way the estate has been restored to the grantor. But where there is no notice of the first deed, this is postponed to an attachment or subsequent conveyance, without allowing the first grantee any time to record his deed, even though there is notice of an intention to make a deed. If a mortgagee assign the mortgage, and afterwards take a deed from the mortgagor, and the assignment be not recorded, the assignment is invalid against creditors of the mortgagee, who may attach the land as his. (*Clark v. Jenkins*, 5 Pick. Rep. 280.) As between parties claiming under different grantors, priority of registry has no legal effect. Registry is constructive notice only as between purchasers from one grantor. (*Tyler v. Hammond*, 11 Pick. Rep. 193.) A., claiming under an ancient deed, not recorded, had been out of possession more than forty years, and the land had been used as a road. The road being discontinued, B. purchased the land from C., having no notice of the deed to A. A.'s deed was afterwards recorded. Held, A.'s title should prevail. (Ib.) The certificate of the register of deeds is conclusive, as between the grantee and a creditor, as to the time of recording the deed. (*Tracy v. Jenkins*, 15 Pick. Rep. 465; see Hilliard on Real Property, vol. 2, pp. 429, 432.)

In Connecticut deeds are recorded in the office of the town clerk where the land lies. Otherwise, they are good only against the grantor and his heirs. *Reasonable time* is allowed for recording. Acknowledgment is made by the grantor or his attorney. The power of attorney is acknowledged and reoordered. Leases for more than one year, are good only between the parties, unless acknowledged before a justice of the peace, or school commissioner, and recorded. The registry of a deed is of no validity, if such deed is defective through the want of some statutory requisites, whether the defect appear upon the face of the

instrument or not. (*Summer v. Rhoades*, 14 Conn. Rep. 135.) Where a deed is received for record, this entry made upon it by the register, and the deed lodged in the office, the effect is the same as that of actual registration. (*McDonald v. Leach*, Kirby's Rep. 72.)

In Maine, delivery of a deed to the register, is in law a recording of it. (Rev. St. 78, 373, 586.) Where a deed is not recorded, in order to charge a second purchaser &c. with notice, the facts must be such as to leave no reasonable doubt. Knowledge on the part of the attorney of a creditor who brings the action, will not charge the latter. (7 Greenl. Rep. 195; 1 Shepl. 9; 5 Greenl. 339; 4 Greenl. 20.) Conveyance from A. to B. A. at the same time takes back a deed to himself and his two sons. The former deed was recorded, but not the latter, but A. remained in possession. Held such possession was so far notice of the deed to A. that a creditor of B. could not hold the land. (*Webster v. Maddox*, 6 Greenl. Rep. 256.) A. conveyed to B., and B. entered, but the deed was not recorded. B. conveyed to C., who suffered the land to remain vacant. D. fraudulently induced B. to surrender his deed to A., and himself took a deed from A., which was recorded, entered and occupied until his death; and his administrator then conveyed to E., who was ignorant of D.'s fraud, and of the deed from A. to B. In an action by C. against E., held B.'s possession was only implied notice of his title, and that E. having no actual notice, should hold against C. (*Hewes v. Wiswell*, 8 Greenl. Rep. 94.)

In Rhode Island, registration is unnecessary as between the parties and their heirs. Deeds for more than one year, are recorded in the office of the town clerk, where the land lies, and take effect in the order of their registration, except that five days are allowed for recording a *defeasance*. (Stat. 1841, p. 2033; 1842, 2068, 2076.)

In New Hampshire, deeds, except leases for more than seven years, must be recorded; otherwise, they are valid only against the grantor and his heirs. So also, powers of attorney to convey. Any one interested in a deed may, by warrant from a justice of the peace, require the party having possession of it, to put it on record. (Rev. St. 67, 243, 4; *Southerin v. Mendum*, 5 N. H. Rep. 427, 8.) Although where an owner conveys land, and the grantee neglects to record his deed, the grantor may validly convey anew, to an ignorant third person, yet one having

no evidence or pretence of title, cannot pass a good title to another, merely because the true owner has neglected to record his deed. A stranger to the title cannot, any more than the grantor himself, object to the want of registration. (7 N. H. Rep. 527; 11 Pick. Rep. 193; 6 N. H. Rep. 250; 9 N. H. Rep. 24.) A. conveyed to B. The deed was not recorded, and A. occupied until his death, and devised to C. C. entered after A.'s death, and conveyed to D. who had notice of the deed to B. Held, the land passed by the will, and D. should hold against B. and his assigns. (6 N. H. Rep. 47.) A deed or power of attorney, must be acknowledged, or proved, according to law, in order to authorize its registration. (6 N. H. Rep. 250.) Powers of attorney to convey lands, being acknowledged and recorded, are placed on the same footing with deeds, as to the reception of copies in evidence.

In Vermont, a deed for more than one year, is to be recorded in the town clerk's office, or for want thereof, in the county clerk's office, where the land lies. Powers of attorney may be recorded. (Rev. St. 213, 314.) Where a father takes a conveyance to his minor son, but retains the deed himself without recording it, the son has no claim to the deed, or the lands. (*Ward v. Morril*, 1 D. Chip. Rep. 322.) A. conveyed to B., and at the same time gave him an acknowledgment upon a copy of the deed, that he had received the original for the purpose of registration. A. neglected to record the deed, but the copy, with the receipt upon it, was recorded. Held, this registration was not effectual against a creditor of A. who levied upon the land. (*Stevens v. Brown*, 3 Verm. Rep. 42.) A. conveys to B. whose deed is not recorded. B. conveys to C. and D. having notice of such conveyance, fraudulently procures from B. his deed, returns it to A., himself takes a deed from A., and conveys to E. who had no notice of the prior conveyances. Held, E.'s title should prevail over C.'s and over that of a grantee of C. having notice. (1 D. Chip. Rep. 42.)

In New Jersey, a deed may be recorded in the office of the clerk of the Court of Common Pleas, in the county where the land lies. By acts of June 7, 1799, and November 26, 1801, a deed which is duly acknowledged, or proved, takes effect between the parties, and their heirs, though not recorded. A deed recorded within six months, prevails over a subsequent deed to a *bona fide* purchaser, though the latter is first recorded within

that time. A deed may be recorded after six months. But in such case, it is postponed to a subsequent *bona fide* deed, if the latter is left for registry before the former. And *vice versa*, where the former deed is first left. (*Den v. Richman*, 1 Green Rep. 44. 2 Hilliard on Real Prop. 440.)

In Pennsylvania, a deed dated prior to the act of 1775, is good without registration. (2 Serg. & Rawle, 44; 5 Ib. 246.) Where a deed is unrecorded, a second grantee may avail himself of improvements made by him on the land, by way of a consideration, which will give him the prior title. (6 Watts & Serg. 469.) Where a bond of defeasance is unrecorded, but the deed is recorded, the transaction stands like an unrecorded mortgage, which is postponed to a subsequent judgment. (17 Serg. & Rawle Rep. 70.) The recording acts do not apply to the assignment of an insolvent debtor. It however applies to conveyances affecting lands, though not signed and sealed. And the statutes apply to all written contracts concerning real estate. (5 Watts, 77; 4 Rawle, 242; Ib. 440; 3 Watts & Serg. 334.) The registry acts do not apply to subsequent purchasers claiming under an independent title, but only to those claiming under the grantor in the former deed. They apply to subsequent purchasers at an execution sale. But registration of a deed between third persons, is not notice to an execution purchaser not claiming through and under such deeds. (2 Binn. Rep. 497; 6 Ib. 119; 5 Serg. & Rawle 246.) The registering of a sheriff's deed in the prothonotary's office, according to usage, is a sufficient recording. (8 Watts Rep. 68. Hilliard on Real Prop. vol. 2, p. 444, 448.)

In Maryland, a deed of a freehold estate, or an estate for more than seven years, or declaring, or limiting any use, must be recorded in the county where the land lies, within six calendar months from its date. Otherwise, the deed is void between the parties. Where however, registration has been omitted, without fraud, it may be authorized by filing a bill in chancery, and will be effectual except against subsequent purchasers and creditors, if made within six months from a decree. Such decree may be received within eighteen months.

In Delaware, a deed, or letter of attorney, must be recorded within one year; otherwise it is invalid against a subsequent fair creditor or purchaser. This does not apply to a lease for fair rent, for not more than 21 years, attended by possession, or

where the lessee is to have possession within one year. Mortgages lodged for registry at the same time, have priority according to their dates ; if made for the purchase-money of land, sixty days are allowed for recording. In case of a defeasance the grantee must endorse upon, and record with his deed, a note thereof. The defeasance, though unsealed, must be acknowledged and recorded within sixty days; else it is void against purchasers, &c.

In Mississippi, the conveyance by writing, sealed and delivered, of any inheritance, freehold, or term for more than one year, is invalid against a creditor, or an ignorant purchaser for consideration, unless the instrument is recorded. (Rev. Code of Miss. 452.) All deeds, agreements, &c., relating to land, except instruments of trust and mortgages, if recorded in three months, take effect from their execution. Deeds of trust and mortgages, and other instruments recorded after three months, take effect from delivery to the recorder. But if two deeds delivered to the recorder on the same day, the one first executed, has priority. (Ib. 453, 454.) No instrument can be recorded without acknowledgment and proof. The clerk is required to give a receipt for deeds left for record. (Ib. 454, 455.)

In North Carolina, no conveyance or bill of sale of land, (except mortgages) is good, and available, unless recorded in the county where the land lies, within two years from date. A mortgage, or deed in trust, is void against creditors or purchasers, unless proved and recorded, like other deeds, within six months. As against such creditors, &c., a title passes only from registry. Marriage settlements and contracts are void against creditors, unless proved like other deeds, within six months from the making, and recorded in one month thereafter. (Rev. St. 224, 235 ; St. 1842, 3, 80, 81.)

In South Carolina, in the district of Charleston, deeds are recorded in the office of the Register of mesne conveyance ; in other districts, by the clerks of the circuit court for each district. They must be recorded within six months from delivery, when the grantor resides in the state ; twelve months, if in another of the United States ; and two years, if abroad. A mortgage is valid against a purchaser, &c., without notice, if recorded in sixty days. Marriage settlements to be good against creditors, are to be proved and recorded, or lodged in the Secretary of



State's office, within three months, if made in the state, otherwise, in twelve months.

In Ohio, mortgages take effect from the record of them, or presentation therefor. Any other deed must be recorded in six months, in the county where the land lies; otherwise, it is fraudulent against a subsequent *bona fide* ignorant purchaser.

In Tennessee no deed is admissible in evidence until recorded. When duly proved or acknowledged, it may be registered at any time, so as to give it effect between the parties; and within twelve months, to make it effectual against all persons.

In Kentucky, deeds are usually recorded by the clerk of the county where the land lies, but may be also, in the office of the general court, and court of appeals, and this is usually done where the lands lie in different counties. A deed for more than five years, is void against a subsequent purchaser without notice, or a creditor, either prior or subsequent, unless acknowledged or proved by two witnesses, and lodged for record within eight months. Deeds of mortgage, or of trust, are limited to sixty days.

That the legislatures of so many different states have introduced such a system for the recording of all deeds, sufficiently proves its utility. Those who have had occasion to examine titles to real estate in our country, will acknowledge that its practical operation is highly beneficial. Every person, before buying a piece of land, in the states where deeds take priority from the time of registry, has it in his power, with a very moderate degree of trouble and expense to obtain satisfactory evidence of the state of the title. The cases indeed are rare in which a suitable examination shows an apparently clear title in the vendor, that the purchaser is in danger from latent adverse claims.

"In England, the practice of recording deeds, is of local, and very limited application. It applies to the Bedford level tract, to the ridings of Yorkshire, and to the county of Middlesex. During the period of the English commonwealth, there was an effort to establish county registers for recording deeds, throughout England. The ancient policy was in favor of the entire publicity of transfers of land, by the fine of record, the livery under the feoffment, the enrolment of a bargain and sale, and the attornment under the grant. But the ingenuity of conveyancers, and the general and natural disposition to withdraw

settlements, and the domestic arrangements, from the idle curiosity of the public, have defeated that policy. In Scotland, freehold, but not leasehold property, is recorded in a public register; and the notarial instrument must be registered within sixty days, to render it effectual against purchasers and creditors." (4 Kent, 458, *and note.*)

15. *Capacity of femes covert to convey.*

At common law, the conveyance of a *feme covert*, except by some matter of record, was absolutely void, and in England the wife used to pass her freehold estate by a fine, and this, and a common recovery, were the only ways in which she could convey her real estate. Now the English law is changed, as to the mode of conveyance of the wife, by the abolition of fines and recoveries, and the wife conveys by deed with her husband's concurrence. By stat. 3 and 4 Will. 4, c. 74, for abolishing fines and recoveries and substituting more simple modes of assurance, provision is made for the alienation by married women by deed. It is enacted that after the 31st of December 1833, it shall be lawful for every married woman, in every case, except that of being tenant in tail, by deed, to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any power which may be vested in, or limited, or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do, if she were a *feme sole*; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed, by which the same shall be effected, nor unless the deed be acknowledged by her, as thereafter directed: and it is provided that the powers of disposition given to a married woman by the act, shall not interfere with other powers. In case the husband is a lunatic, or otherwise incapacitated the Court of Common Pleas, is empowered to dispense with the husband's concurrence, except where the Lord Chancellor, or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement, in lieu of the husband. (2 Kent, 150; 2 Greenl. Cruise, 23; 24.)

"The conveyance of land, by *femes covert* under the govern-

ment of the colony of New York, was in point of fact, by deed, and not by fine, and upon the simple acknowledgment of the wife, before a competent officer without private examination. Such loose modes of conveyance, were mentioned in the act of the 16th of February, 1771, and were confirmed; but it was declared that in future, no estate of a *feme covert* should pass by deed, without her previous private acknowledgment before the officer apart from her husband that she executed the deed freely, without any fear or compulsion of her husband. The deeds of *femes covert*, in the form used in other cases, accompanied by such an examination, and which is still required by statute, have ever since been held sufficient to convey their estates, or any future contingent interest in real property, and fines and recoveries are now abolished by statute in New York. If the wife resides out of the state, she may unite with her husband, and convey all her right and interest, present and contingent, equally as if she were a *feme sole*, and without any such special acknowledgment. Nor does a deed by the wife in execution of a power or trust, require a private examination. The substitute in favor of a conveyance by the wife, of a deed for a fine or common recovery, was made in Maryland by the colony statutes of 1715, 1752 and 1766; and the statute law of that state is explicit that the husband and wife must join in the conveyance. So in Massachusetts, from the earliest periods of the colony, the wife with the concurrence of her husband, could convey her estate in fee, by deed duly acknowledged and recorded. In New Jersey, by their early colony laws, the wife might convey her estate by deed, provided she was previously and privately examined by a magistrate. In South Carolina, Georgia, and Kentucky, the wife conveys in the same way, and in Rhode Island, Connecticut, Ohio, Indiana, Missouri and North Carolina, (and this is, no doubt the general rule,) the husband must join in the conveyance by the wife and she must be separately examined before an officer." (2 Kent, 151, 152, 153.)

It seems that in Maine, New Hampshire, Massachusetts, and Connecticut, the wife's acknowledgment of the deed before a magistrate, in the common form is sufficient; but that in nearly or quite all the other states, it is necessary that she be separately and privately examined. In Virginia, it has been held that the private examination, or something equivalent, is necessary, to pass merely equitable rights. It has been sometimes held that

the wife's conveyance may be effectual, although some statutory requisitions, merely formal, are not complied with. Hence, in Ohio, where the magistrate's certificate stated only the substance of the transaction, this was held sufficient. And a statute of Pennsylvania declares valid all deeds made prior to September 1, 1836, though the certificate be defective. A similar statute exists in South Carolina. But substantial deviations from the form prescribed will render the deed invalid. Thus, where a statute requires the wife to renounce her right to lands, in the manner required in the case of dower, and to renounce all her estate, interest and *inheritance*; a renunciation of all her *interest and estate* and also, *all her right and claim of dower*, will not pass her land. So in case of a conveyance by a husband, in his own name, of his wife's land, she merely signing and sealing the deed, "in token of her relinquishment of all her right in the bargained premises;" held, her interest did not pass, and, after his death, she might maintain a writ of entry for the land, on her own seisin. And no amendment will be allowed in the defective acknowledgment of a wife upon parol evidence. Upon the same principle, a usage or statute authorizing a married woman to convey her land, being a departure from the common law, will be limited strictly to an actual transfer of the property. Thus a mere agreement made by her to convey, though made for valuable consideration, and with consent of the husband, is void even in chancery. A statute of Delaware provides that the wife shall be bound by no warranty, except a special warranty against herself, her heirs, and those claiming under her; and a statute of Kentucky, that the wife's deed shall not pass her estate but "shall be as effectual for every other purpose, as if she were unmarried." (See Hilliard on Real Property, vol. 1, p. 122, 123.)

In Illinois, if the examining magistrate does not personally know the woman, her identity must be proved by one witness. In Missouri, the identity is to be proved by two witnesses. The execution of the deed must be the wife's own personal act; if it be signed with her name, by her husband, though in her presence, and by her direction, it is not a compliance with the statutes requiring deeds to be subscribed by the grantor's own hand. And she cannot convey by attorney. The certificate of the magistrate must show that, in her examination, the requirements of the statute were substantially pursued; and, in the absence

of fraud, no parol proof is admissible either to qualify it, or to supply its defects or omission. But, in the absence of proof to the contrary, it will be presumed that the magistrate, in conducting the examination, did his duty in making her acquainted with the contents of the deed. (See note to Greenl. Cruise, vol. 3, p. 24.)

In Michigan, Vermont, Massachusetts, New Hampshire, and Maine, provision is made, by which the wife, if deserted by the husband without being left by him with the means of support may be authorized by the courts to sell her real estate, and in several other respects to act as a *feme sole*. In Massachusetts and Michigan, this power may also be given if he is sentenced to the state prison. In Maine, it may be given if he is *confined* there. In New Hampshire, it may be given if the desertion has continued for three months; or, if she has good cause of divorce against him; or, if any cause exists which, by lapse of time, may ripen into just ground of divorce. In Maine and Massachusetts, a married woman coming into the state to reside, her husband never having lived with her in the state, may make valid conveyances, and do other acts as a *feme sole*. And the principle is now generally, if not universally established in the United States as a necessary exception to the rule of the common law disabling a *feme covert* to contract or sue alone; that where the husband was never within the state, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make contracts, and sue and be sued, as a *feme sole*. The same principle, it is presumed, will enable her to convey her own real estate, where no other provision has been made by statute. But to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from, and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto* and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm. *Ib*.

#### 16. *Liability of land for debt.*

At common law, in all actions where judgment for money alone was obtained, satisfaction could only be had of the goods

and chattels of the defendant, and the *growing profits* of his lands, but not the possession of them. This was a natural consequence of the feudal principles which prohibited the alienation and, of course, the encumbering a feud with debts. When the restrictions on alienation were taken away, this consequence still continued ; no creditor could take possession of his debtor's lands, but only levy the growing profits ; and, if the debtor aliened the land, the creditor lost even that. To remedy this it was enacted, in the reign of Edward I., that the judgment creditor should have his election of a sequestration of the profits of the land, by writ of *levari facias*, or the possession of a moiety of the lands by the writ of *elegit*. In all these cases, the creditor holds the land in trust until the debt is discharged, by the receipt of the rents and profits.

In all of the United States, except Virginia, all the debtor's lands are liable to be taken for his debts. In some of the states, the debtor's lands are sold absolutely at auction, without any previous appraisement, and without any subsequent right of redemption ; and the sheriff executes a deed to the purchaser, which by relation vests the defendant's title in the purchaser, from the time of the sale. In New York, a redemption of the lands sold may be made by the debtor, or his representative, within one year, on paying the amount of the bid, with ten per cent. interest, and by any judgment creditor within fifteen months, on paying the purchase-money, with seven per cent. interest. In Maine, New Hampshire, and Massachusetts, the debtor is allowed a year to redeem ; and in Vermont, six months. In Rhode Island and Connecticut, previous appraisement is necessary, and the levy and assignment of the lands to the creditor, at the appraised value, carries the title when the execution is returned and recorded ; and there is no time allowed to redeem. In Pennsylvania and Delaware, the lands are to be appraised ; and, if the inquest finds that the rents and profits for seven years will discharge the debt, the lands are then *extended* by the writ of *liberari facias*, and possession given to the creditor, as is done upon the *elegit* in England ; but, if not so found, the lands are to be sold without redemption. In Ohio, the lands are not to be sold under the amount of two-thirds of their appraised value. In Kentucky, the land must be previously appraised, and it may be redeemed at any time in twelve months, unless it brings two-thirds of its appraised value. In Louisiana

and Mississippi, if the lands do not bring two-thirds of the appraised value, a peremptory sale is prevented, by the giving of security. In Indiana, the rents and profits of the land for seven years are first sold, and if they do not satisfy the execution, the fee-simple is sold to the highest bidder. In Illinois, both real and personal property, levied on execution, are to be appraised, and the property is not to be struck off on the sheriff's sale, unless two-thirds of the amount of the valuation is paid for. The law is similar in Michigan. In Tennessee, lands sold on execution, may be redeemed within two years, upon payment of the amount of the bid, ten per cent. interest thereon, and all lawful charges. (See 4 Kent Com. 428, *et seq.*)





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# A COMPENDIUM,

&c. &c.

## CHAPTER I.

Chapter I.

### AS TO RESTRICTIONS ON THE GENERAL CAPACITY TO BUY OR SELL REAL ESTATE.

1. *As to who are generally incompetent to sell.*
2. *Who are relatively incompetent to sell.*
3. *Who are generally incompetent to purchase.*
4. *Who are relatively incompetent to purchase.*

THE questions who may sell, and who may buy, real estate, may be conveniently discussed, by assuming the existence of a general capacity to enter into the relation of vendor or purchaser; and by then treating of the exceptions to the general rule.

Incapacities to sell or buy, may be considered as of two descriptions; 1st, such as depend on some circumstance personal to the proposed vendor or purchaser, and affecting his general capacity to buy or sell any real estate: general and, 2ndly, such as depend on the relation in which he or relative. stands to the particular property proposed to be sold or bought; or to the party with whom he purposes to deal.

#### (1.) *As to incapacities to sell of the 1st description.*

A proposed vendor, although having a good title to, and being the absolute owner of property, and standing in no situation of trust towards the proposed purchaser, may yet be under some personal incapacity, which may prevent a sale: that is to say, he may be, 1st, An infant: As to who are generally incompetent to sell. if so, he can, as a general rule, execute no conveyance Infants.

[\*2]

## Chapter I.

which will bind, either himself when he comes of age, or his heirs in the event of his dying, either under age, or of full age, but without having (in those cases which admit thereof) confirmed the transaction.(a)[1]

(a) 4 Bac. Abr. 360, *et seq.*; any deed which takes effect by delivery, is, if executed by an infant, voidable only; but letters of attorney, and deeds which delegate a mere power, and convey no interest, are absolutely void; *Zouch v. Parsons*, 3 Burr. 1794; *Anon. v. Handcock*, 17 Ves. 383; *Allen v. Allen*, 2 Dru. & War. 307.

[1] Bingham, in his treatise on the law of infancy, concludes, from a review of the cases, that those acts of an infant which are capable of being legally ratified, are voidable only; and the acts which are incapable of being legally ratified, are absolutely void; and he insists, that all the deeds, acts and contracts of an infant, except an account stated, a warrant of attorney, a will of lands, a release as executor, and a conveyance to his guardian, are, in judgment of law, voidable only, and not absolutely void. (Bingham on Infancy, 33.)

Kent (2 Kent's Com. 235,) says, that the modern, as well as the ancient cases, are much broader in their exception; though he admits that the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule that the acts and contracts of infants, should be deemed voidable only.

In general, where a contract may be for the benefit, or to the prejudice of an infant, he may avoid it, as well at law as in equity. Where it can never be for his benefit, it is utterly void. (Fonbl. Eq. b. 1, ch. 2, sec. 4.) And in respect to the acts of infants of a more solemn nature, such as deeds, gifts, and grants, Lord Mansfield, in *Zouch v. Parsons*, 3 Burr. Rep. 1804, held the law to have been truly laid down by Perkins, sec. 12, that "all such gifts, grants, or deeds, made by an infant, which do not take effect by delivery of his hand, are void. But such gifts, grants, or deeds, made by an infant, by matter in deed, or in writing, which take effect by delivery of his own hand, are voidable." This distinction is adhered to by Chancellor Jones, (in *Stafford v. Roof*, 9 Cowen's Rep. 626,) where he holds that manual delivery was requisite to render the infant's deed of lands or chattels voidable only. Chancellor Kent thinks the modern rule, as now understood, is not quite so precise. He however adds, that the doctrine of the case of *Zouch v. Parsons*, has been recognized as law in this country, and that it is not now to be shaken. (2 Kent's Com. 236.)

In *Oliver v. Hendlet*, 13 Mass. Rep. 230, the court seemed to think the true rule to be that those acts of an infant are void, which not only apparently, but necessarily operate to his prejudice. In *Whitney v. Dutch*, 14 Mass. Rep. 462, the same court said, that whenever the act done, may be for the benefit of the infant, it shall not be considered void, but that he shall have his election when he comes of age to affirm or avoid it. And they added, that this is the only clear, and definite proposition which can be extracted from the authorities. In *Carrol v. Bird-*

Nor has a court of equity any authority to sell the real estate of an infant under the mere notion that a sale will be beneficial.(b)[2]

But, by statute, in particular cases, infants holding lands in trust, or subject to the debts of the ancestor or testator, are enabled to convey under the authority of the Court of Chancery;(c)[3] and in various special cases, infants, or their guardians, are enabled, by statute, to sell and convey land for purposes connected with religion,(d) instruction,(e) or works of public nature.[4]

Chapter I.

Estates of, cannot be sold by the court, except under special circumstances.

But they may convey under statute.

And are empowered by statute to sell for certain special purposes.

(b) *Calvert v. Godfrey*, 6 Beav. 97; and see *Wood v. Patleson*, 10 Beav. 541; as to the sale under special circumstances, see *Garmstone v. Gaunt*, 1 Coll. 577.

(c) Vide *infra*, ch. XIII. and XIX.

(d) See, for a list of the Church Building Acts, the preamble to 3 and 4 Vict. c. 60.

(e) See 4 and 5 Vict. c. 38; and 6 and 7 Will. IV. c. 90.

*sell*, 1 John. Cas. 127, the court approved of the doctrine of Perkins as it was interpreted and adopted in *Zouch v. Parsons*. But in *Jackson v. Burckin*, 14 John. Rep. 126, the court doubted whether a bargain and sale of lands, by an infant, was a valid deed to pass the land, as it would make him stand seized to the use of another. See also *Tucker v. Moreland*, 10 Peters Rep. 58; 11 Johns. Rep. 539; 15 Mass. Rep. 225; 1 N. H. Rep. 73; 2 Ib. 55; 6 Conn. Rep. 494; 5 Yerger's Rep. 41; 6 Ib. 1 S. P.; 6 Mason's Rep. 82.

An infant can only avoid an act done of record, pending infancy; otherwise as to acts *in pais*. An act after twenty-one disavowing or dissenting from a deed delivered during infancy, with equal solemnity with the deed, annuls and avoids the deed. (*Breckenbridge v. Ormsby*, 1 J. J. Marsh. 252.)

A contract was made by a guardian respecting the lands of infants. Their right to declare it void after maturity, was reserved in the contract; after attaining their age, they filed a bill renouncing the contract, and asserting their original rights. Afterward, by our amended bill, they prayed relief under the contract. Held, that their renunciation was a bar to all relief under it. *Floyd v. Johnson*, 2 Litt. 109.

To render a subsequent conveyance, by an infant, after he arrives of age an act of dissent to the prior deed, it must be so inconsistent therewith that both deeds cannot properly stand together. *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635.

[2] See American Chancery Digest, by Waterman, p. 416.

[3] The equity jurisdiction, in this case, is grounded in the statute. 7 Anne, c. 19, which has been re-enacted in this country. See 2 New York Rev. Stat. part 3, Ch. 1, Art. 7.

[4] If an infant be a tenant in common, he may make a reasonable partition. (*Barrington v. Clarke*, 2 Penn. Rep. 115.) His acts as executor,

## Chapter I.

May exercise  
collateral  
power.

And may sell  
under cus-  
tom of gavel-  
kind.

[\*3]

So an infant can convey under a power simply collateral,<sup>(f)</sup> but he cannot be empowered, at least as against himself, to contract for the sale of land, or to do any other act which requires an exercise of discretion.[5]

But by the custom of gavelkind, an heir at the age of fifteen, may, for valuable consideration, sell and convey for an estate in possession, lands which he took by descent; the conveyance being by feoffment, and livery of seisin being delivered by him in person.<sup>(g)</sup>

(f) Sug. Pow. 211, 7th ed.

(g) Bac. Abr. pp. 49, 50. This customary feoffment is excepted from 8 and 9 Vict. c. 106, s. 3.

at the age of seventeen, will bind him, unless they be acts which would amount to a *devastavit*. In New York, however, he is declared to be incompetent to act as an executor or administrator. (N. Y. Rev. Stat. vol. 2, p. 69; *Id.* 75.)

[5] Four persons, of whom two were infants, conveyed real estate to M., in fee. M. mortgaged the whole to the complainants, and then sold (subject to the mortgage) to C. The latter got one of the infants on coming of age to release to him. Upon a bill filed by the complainants for foreclosure and sale, C. set up that M. had only a right in half of the property at the time of the mortgage, because of the infancy of two of the grantors; held, that the mortgage was a valid security upon the share conveyed by the infant, whose subsequent release was a confirmation of the title under which the mortgage had been given; and that the mortgage was also good against the remaining share, until the other infants should do something in avoidance of the deed. 1 Edwards, 301.

Where a wife, who is an infant, unites with her husband in a deed of conveyance of his real estate to trustees, for the payment of his debts, under an ignorance of her legal rights, being informed, at the time she signed and acknowledged the deed, that the same would not prejudice her rights, such deed cannot afterward be set up against her as a bar of her right of dower in the land so conveyed. *Sandford v. McLean*, 3 Paige, 117.

A conveyance by an infant feme covert, although executed and acknowledged, in the manner prescribed by the statute, is void. (*Id.*)

After marriage, an infant feme covert, cannot bind herself by any deed or contract, either in law or equity, except under the sanction of the court of chancery or in the cases, specially provided for, by statute. (*Id.*)

Where D. sold land to B., an infant, and the infant gave to D. a bond and mortgage upon the premises for the purchase-money; and the deed and mortgage were both duly acknowledged and recorded, and one-half of the purchase-money was paid to D. by B., at the time of the purchase; and B. the infant, went into possession of the premises, and continued in possession until after he arrived at the age of twenty-one years; and then

An infant, however, has no privilege to commit a fraud(h): if, therefore, he were to sell and convey, asserting that he had attained his majority, it is conceived that the purchaser would, in equity, be entitled to the protection of the legal estate, (supposing him to have acquired it :) and that, if the infant, (supposing *him* to have the legal estate,) were to proceed at law to recover the property, equity would restrain the action, except upon the terms of his refunding the purchase-money; for instance, where an infant received a premium for a lease of his lands, upon his false assertion that the lessor was his guardian, Lord *King* decreed a return of the premium with interest.(i) It has, however, been held that, in order that Equity may interfere, there must be something equivalent to misrepresentation on the infant's part; and that the mere fact of his entering into a transaction which *could* be valid only if entered into by an adult, is not such a fraud as entitles the other party to relief.(j)[1]

Chapter I.  
Fraudulent sale by, what relief against in equity.

There must be misrepresentation.

By the 53 Geo. III. c. 141, s. 8, all contracts for the sale of any annuity or rent-charge by an infant are de-

Sale of annuity or rent-charge by, is

(k) *Chambers on Infancy*, 412; and see *Overton v. Banister*, 3 Hare, 503.

(i) *Esron v. Nicholas*, 1 De G. & S. 118.

(j) *Stikeman v. Dawson*, 1 De G. & S. 90; *Wright v. Snowe*, 2 De G. & S. 321.

sold the same to R., who conveyed them again to other persons; and all the persons had full knowledge of the mortgage, which was assigned by D. to L., it was held that the mortgage was a legal charge upon the land, and that if the premises did not sell for a sum sufficient to discharge the amount due upon the mortgage, with the cost of the suit, B. would be liable to pay the balance. *Lynde v. Budd*, 2 Paige, 191.

A letter of attorney given by an infant, is absolutely void. (*Pyle, &c. v. Cravens*, 4 Litt. Rep. 21.)

The avoidable acts of an infant, will be confirmed by slight acts and circumstances, after he is of age. *Deason v. Boyd*, 1 Dana, 45.

[1] See 1 Fonbl. Eq. B. 1, Ch. 3, sec. 4; *Savage v. Foster*, 9 Mod. Rep. 35; *Evroy v. Nichols*, 2 Eq. Abridg. 489; *Clare v. Earl of Bedford*, cited. 2 Verm. 150, 151; *Beecher v. Lordley*, 1 Bro. Ch. Rep. 357; *Sugden on Vendors*, ch. 16, p. 262, 9th edit.; *Bright v. Boyd*, 1 Story C. C. Rep. 478; 2 Hovend on Frauds, ch. 22, p. 184; *Story's Eq. Juris.* vol. 1, secs. 385, 386.

Chapter I.  
void by Stat-  
ute.

Lunatics.

Sales by,  
how far void  
or voidable.

[\*4]

clared utterly void, notwithstanding any attempted confirmation after majority: and the intended purchaser is made guilty of a misdemeanor.

Or, 2ndly, The proposed vendor may be a lunatic or idiot; in which case, according to the early authorities, his conveyance may be set aside by his Committee, or his heirs after his death: yet he himself, though he recovered his senses, was said to be unable to avoid it ;(*k*) at least if \*made by feoffment, with livery of seisin delivered by him in person :(*l*) it has, however, been held, that a Bargain and Sale, Lease and Release, or other innocent conveyance by a lunatic, is absolutely void ;(*m*) and the 8 & 9 Vict. c. 106, s. 4, which deprives a Feoffment of its tortious operation, would appear to render such a conveyance by a lunatic equally inoperative; the rule, however, against a party being allowed to stultify himself, would not prevail in equity, (*n*) nor, according to the modern authorities, at law, (*o*) in favor of a purchaser who had knowingly dealt with an incompetent vendor. While, on the other hand, it has been held, at law, in a very recent case, that where a person, apparently of sound mind and not known to be otherwise, enters into a contract which is fair and *bona fide*, and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic or his representatives :(*p*) and such seems to be the present doctrine of the Courts of Equity. (*q*)[1]

(*k*) *Beverley's case*, 4 Rep. 123 *b*.

(*l*) *Thompson v. Leach*, Comb. 468; *Beverley's case*, *ubi supra*.

(*m*) 2 Sug. Pow. 179, 7th edit.

(*n*) Shelf on Lunacy, 350.

(*o*) *Molton v. Camroux*, 2 Exch. Rep. 487, 501; S. C., in error, 18 L. J., N. S. Exch. Cham. 356, and cases cited.

(*p*) S. C.

(*q*) *Niell v. Morley*, 9 Ves. 478; see also, *Price v. Berrington*, 7 Ha. 394; *Williams v. Wentworth*, 5 Beav. 325; *Selby v. Jackson*, 6 Beav. 192; Aff. on Appeal, p. 204.

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[1] The general rule is, that sanity is to be presumed, until the contrary is proved, and therefore by the common law, a deed made by a person

And if a lunatic levied a Fine or suffered a Recovery in person, the conveyance was held to be good:(r) but, of course, no similar result would now be attained by his executing an assurance under the Fines and Recoveries Abolition Act.

Chapter I.

Fine or recovery.

Or disentailing assurance by.

And, in various special cases, Committees of Lunatics are, as are infants,(s) enabled by Statute, to sell and convey land.[1]

Statutory power of Committees.

[\*5]

Or, 3rdly, The proposed vendor may be a married wo-

Married wo-

(r) See Shelf. on Lunacy, p. 316, *et seq.*; *Murley v. Sherren*, 8 Ad. & E. 754; but as to the deed making the tenant to the præcipe, and the declaration of uses (if any) being affected by the Lunacy, see 3 Atk. 313.

(s) *Supra*, p. 2.

*non compos*, is voidable only and not void; and when an act is sought to be avoided on the ground of mental imbecility, the proof of the fact lies in the person who alleges it. On the other hand, if a general mental derangement be once established or conceded, the presumption is shifted to the other side, and sanity is then to be shown. The party himself, may set up as a defence, and in avoidance of the contract, that he was *non compos mentis* when it was alleged to have been made. (2 Kent's Com. 451.) "The principle," says Kent, "advanced by Littleton and Coke, that a man shall not be heard to stultify himself, has been properly exploded, as being manifestly absurd, and against natural justice." (Ib.) See 5 Johns. Rep. 144; 2 Iredell's N. C. Rep. 23.

The contracts of lunatics are generally void from the period at which the inquisition finds the lunacy to have commenced. But the inquisition is not conclusive evidence of the fact; and the party affected by the allegation of lunacy, may gainsay it by proof, without first traversing the inquisition. (2 Kent. Com. 450.)

Not only may contracts and deeds, of a person *non compos*, be set aside for fraud; but other instruments, and acts of the most solemn nature, even of record such as fines levied, and recoveries suffered, by such a person, may, in effect, be overthrown in equity, although held binding at law. For although courts of equity will not venture to declare such fines and recoveries utterly void, and vacate them; yet they will decree a reconveyance of the estate to the party prejudiced, and hold the conusee of the fine, and the demandant in the recovery, to be a trustee—for the same party. (See Story's Eq. Juris. vol. 1, sec. 229.)

A deed made while a grantor was a lunatic, would require a re-execution, when he was of sound mind, to give it validity. If however the incompetency arose from disease producing feebleness of intellect only, long acquiescence, after restoration, would amount to a confirmation. (*Jones et al. v. Evans*, 7 Dana Rep. 96.) As to incapacities of lunatics, see *Waterman's Amer. Ch. Digest*, vol. 2, pp. 393, 394.

[1] See 2 New York Rev. Stat. part 2, ch. 5, tit. 2.

## Chapter I.

man can in general only convey under 3 and 4 Will. IV. c. 74.

man ; in which case she may, with her husband, convey her freehold estates under the Fines and Recoveries Abolition Act ; but any other conveyance executed by her is, at Common Law absolutely void : (t) her copyhold estates will pass by her surrender with her husband's concurrence ; or, if her interest be merely equitable, either by such a surrender or by deed acknowledged under the Act ; and her legal terms for years will pass by the sole assignment of her husband ; (u) though whether they will be bound by his contract, in the event of his death in her lifetime and before conveyance, seems to be doubtful : (v) as respects her equitable terms for years, it would appear, that in order to perfect the title, she must join in and acknowledge the assignment. (w) [2]

May be restricted from selling, although the entire estate be given to her.

And although the legal and equitable fee simple may be vested in a married woman, she and her husband may, nevertheless, be unable effectually to assure it to a purchaser ; for where the property has been acquired under a will or settlement which forbids alienation during coverture, such restriction is binding, although no trustee be interposed. (x)

May convey in exercise of a power.

But a married woman may, in exercise of a power, pass, either a legal estate, by limitation of an use, or an equitable estate : and she has always an implied power to dispose of, as if she were single, her equitable interest in

May dispose of her separate estate, if not restrained from anticipation.

(t) Burton's Comp. pl. 206 ; see judgment in *Zouch v. Parsons*, 3 Burr. 1805.

(u) Burton's Comp. pl. 895.

(v) *Infra*, Ch. XVIII.

(w) See *Hanson v. Keating*, 4 Hare, 1.

(x) *Baggett v. Meux*, 1 Ph. 627 ; *Steedman v. Poole*, 6 Hare, 193.

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[2] The wife, may, as an attorney to another, convey an estate in the same manner, as her principal could, and she may execute a power simply collateral, and in some cases, a power coupled with an interest, without the concurrence of her husband. She may also transfer a trust estate, by lease and release, as a *feme sole*. (2 Kent's Com. 151 ; Sugden on Powers, 148 ; *Barnaby v. Griffin*, 3 Vesey, 266.)



property settled to her separate use with no restriction upon alienation.(y)[1] Chapter I.

\*The observations already made (z) upon fraudulent sales by an infant, apply, it is conceived, to similar transactions by a married woman.(a) [\*6]  
Relief against fraudulent sale by.

Or lastly ; The proposed vendor may have been guilty of treason, or murder, either as principal or accessory before the fact ;(b) and have thereby subjected his land to forfeiture and escheat, upon his attainder,(c) that is upon sentence of death being passed upon him ;(d) or of any other felony punishable with death, attainder upon which involves forfeiture during life:(e) or he may have incurred a Præmunire ;(f) and in any of these cases, or at least in any of the first three, his conveyance, although *bona fide*, for valuable consideration, and to a purchaser without notice, is subject to the inchoate rights of the Crown, or the Lord of the fee.(g)[1] In these cases, however, that Traitors, felons, &c.

(y) 1 Sug. Pow. 206, 7th edit. ; Vendors, 230 ; and see also, *infra*, Ch. XVIII. as to contracts for sale by married women.

(z) *Supra*, p. 3.

(a) See *Jones v. Kearney*, 1 Dru. & War. 134 ; *Savage v. Foster*, 9 Mod. 35 ; and 6 Ves. 181.

(b) 54 Geo. III. c. 145 ; 9 Geo. IV. c. 31, s. 2.

(c) 3 Bac. Abr. 738.

(d) 4 Jarm. Conv. by S. 74.

(e) 4 Bl. Com. 385, and 54 Geo. III. c. 145.

(f) 16 Ric. II. c. 5.

(g) See *Grosse v. Gayer*, Cro. Car. 172 ; 6 Bac. Abr. 383 ; 4 Jarm. Conv. by S. 75.

[1] It is a fundamental policy of the common law, to allow no diversity of interests between husband and wife ; and for this purpose, it is necessary to take from the wife, all power to act for herself without his consent ; and to disable her, even with his consent, (for her own protection against his influence) from becoming personally bound, by any act or contract whatsoever done *in pais*. But courts of equity, have broken in upon this doctrine ; and have, in many respects, treated the wife, as capable of disposing of her own separate property, and of doing other acts, as if she were a feme sole. In cases of this sort the same principles will apply to the acts and contracts of a feme covert, as would apply to her as a feme sole, unless the circumstances give rise to the presumption of fraud, imposition, unconscionable advantage, or undue influence. Story's Eq. Juris. vol. 1, sec. 243 ; Comyn's Dig. *Baron and Feme* ; 1 Fonbl. Eq. B. 1, ch. 2, sec. 6 ; Clancy on Rights of Husband and Wife.

[1] The forfeiture, in treason, as to real estate, related at common law,

## Chapter I.

which we have, for convenience, referred to as an incapacity to sell, is, in strictness, a mere want of title as against the Crown or Lord of the fee: Leaseholds of traitors and felons are forfeited to the Crown upon conviction; (*h*) but, of these, a *bona fide* sale between the crime and the conviction, will, it seems, be good. (*i*) So, the incapacities of bankrupts and insolvents to sell, depend merely upon their want of title as against their assignees.

Bankrupts  
and insol-  
vents.

Power given  
to incapaci-  
tate owners  
by Lands  
Clauses  
Consolida-  
tion Act,  
1845.

[\*7]

And with reference to incapacities to sell both of the 1st and of the 2nd descriptions, we may here refer to the general consolidating Act of the 8 Vict. c. 18; which enables incapacitated owners, or owners of partial estates, \*to sell land to the promoters of undertakings authorized by Acts in which the general Act is incorporated. (*j*)

(*h*) 4 Bl. Com. 388.

(*i*) *Ibid.*

(*j*) See sects. 6, 7, *et seq.*

back to the time of the treason committed; and therefore all alienations and incumbrances, by the traitor, between the time of the offence and the conviction, were avoided. 2 Hawk. P. C. b. 2, ch. 49, sec. 30; 4 Bla. Com. 380. In New York, any person convicted of any manner of treason, forfeits his goods and chattels, and also, his lands and tenements, during his life-time; but the rights of all third persons, existing at the time of the commission of the treason are saved. N. Y. Rev. Stat. vol. 1, p. 234, secs. 1 and 2; vol. 2, p. 656, sec. 3. Forfeiture of property for crimes, in any other case, is expressly abolished. N. Y. Rev. Stat. vol. 2, p. 701, sec. 22.

"Forfeiture of estate, and corruption of blood, under the laws of the United States, and including cases of treason, are abolished. Forfeiture of property, in cases of treason and felony was a part of the common law, and must exist at this day, in the jurisprudence of these states where it has not been abolished by their constitutions, or by statute. Several of the state constitutions have provided that no attainder of treason or felony, shall work corruption of blood, or forfeiture of estate, except during the life of the offender; and some of them have taken away the power of forfeiture absolutely, without any such exception. There are other state constitutions which impliedly admit the existence or propriety of the power of forfeiture, by taking away the right of forfeiture, expressly in cases of suicide, and in the case of deodand, and preserving silence as to other cases; and in one instance (Maryland) forfeiture of property is limited to the cases of treason and murder." 2 Kent Com. p. 386.

"The English law," continues Kent, "has felt the beneficial influence of the progress of public opinion on this subject. The Statute of 7 Anne, ch.

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(2.) *As to incapacities of the 2nd description affecting vendors.*

As to who are relatively incompetent to sell.

Persons having no transferable title.

Persons standing in a special relation towards the proposed purchaser, which secures undue personal influence.

These may be considered to consist of, 1st, the want of a transferable (*k*) title to the property proposed to be dealt with; and, 2ndly, the existence of some relation on the part of the proposed vendor to the purchaser which prevents a sale except under special precautions; for instance, an agent for purchase cannot sell his own estate to his principal, without acquainting him with the facts<sup>(l)</sup>[1]; and, as a general rule, whenever such a re-

(*k*) See *Attorney General v. Corporation of Plymouth*, 9 Beav. 67; where a corporation was held incapable in equity of contracting to sell property, by reason of a duty which it owed in respect thereof to the public. As to the alienation of charity lands by trustees, see *Attorney General v. Corporation of Newark*, 1 Hare, 395; *Attorney General v. Brettingham*, 3 Beav. 91; *Attorney General v. South Sea Company*, 4 Beav. 453; and cases cited: such alienations are not necessarily void, but it lies on the parties claiming under them to show that they were beneficial for the charity: *vide infra*, Ch. XIX. See 4 & 5 Vict. c. 35, s. 92, removing a customary restriction which, in some manors, prevented the alienation of ancient copyhold tenements in portions.

(*l*) *Gillet v. Peppercorne*, 3 Beav. 78.

29, abolished, after the death of the Pretender, forfeiture for treason beyond the life of the offender; and though the statute of 17 Geo. 2, ch. 29, postponed the operation of that provision, it was only until the death of the Pretender and his sons. And by a bill introduced into parliament by Sir Samuel Romilly in 1814, and afterwards, under modifications, passed into law, corruption of blood, in cases of felony, except murder, was abolished. The ingenious and spirited defence of the law of forfeiture, which was made by Sir Charles Yorke, in the middle of the last century, and in which he insisted, that it stood on just, social and comprehensive principles, and was a necessary safeguard to the state, whether built on maxims of monarchy or freedom, has failed to convince the judgment, or satisfy the humanity of the present age." *Ib*.

[1] On this subject, Story says: "Considering the abuses which may attend dealings of this sort, between principals and agents, a doubt has been expressed, whether it would not have been wiser for the law, in all cases, to have prohibited them. Be this as it may, it is very certain that agents are not permitted to become secret vendors or purchasers of property which they are authorized to buy or sell for their principals; or, by abusing their confidence, to acquire unreasonable gifts or advantages; or indeed, to deal validly with their principals in any cases, except where there is the most entire good faith, and a full disclosure of all facts and

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lation subsists between the contracting parties as may enable one to exercise an undue influence over the other, whether it be that of guardian and ward, solicitor and client, trustee and *cestui que trust*, medical man and patient, spiritual adviser and penitent, or the like, the court, upon proof of the exercise of such undue influence, will set aside the transaction, and will consider the circumstance of the real facts not being stated on the face of the assurances to be in itself *prima facie* evidence of fraud.(m)

[\*8]

As to who are generally incompetent to purchase and hold land. Corporations cannot hold without a license.

\*(3.) *As to incapacities of the first description affecting purchasers.*

Purchasers must, necessarily, be either individuals or a corporation: corporations, of whatever description, may purchase, but cannot, in their corporate capacities, hold lands, except under a license to hold in mortmain(n) or the special provisions of an Act of Parliament.[1]

(m) See *Mulhallen v. Marum*, 3 Dru. & War. 317; *Ahearne v. Hogan*, 1 Dru. 310; *Gibson v. Russell*, 2 Y. & C. C. C. 104; *Hatch v. Hatch*, 9 Ves. 292; *Huguenin v. Baseley*, 14 Ves. 273; *Dent v. Bennett*, 4 Myl. & Cr. 269; *Harvey v. Mount*, 8 Beav. 439; and cases therein respectively cited.

(n) Co. Litt. 2 b.

circumstances, and an absence of all undue influence, advantage, or imposition." Story's Eq. Juris., vol. 1, sec. 315.

[1] In England, corporations, by a succession of statutes, are rendered incapable of purchasing lands, without the king's license, and this restriction extends equally to ecclesiastical and lay corporations. These statutes are generally called the statutes of *mortmain*; all purchases made by corporate bodies, being said to be purchases in *mortmain*, in *mortua manu*. 1 Bl. Com. 479.

"We have not," says Kent, "in this country, re-enacted the statutes of *mortmain*, or generally assumed them to be in force; and the only legal check to the acquisition of lands, by corporations, consists in those special restrictions, contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate, to specified and necessary objects; and, to the force to be given to the exception of corporations out of the Statute of Wills, which declares that all persons, other than bodies politic and corporate, may be devisees of real estate." N. Y. Rev. Stat., vol. 2, p. 57, sec. 3. 2 Kent's Com. 282, 283.

The statutes of *mortmain* are in force in Pennsylvania. The Supreme

Purchases by individuals (who are unincorporated) must be made by them in their private capacities and individual names: *e. g.* a purchase by, *eo nomine*, the in-

Chapter I.

Purchase by an unincorporated class of persons bad.

Court of that State has held that the English statutes of *mortmain* have been received and considered the law there; so far as they were applicable to their political condition; and, that they were so far applicable, "that all conveyances, by deed or will, of lands, tenements, or hereditaments, made to a body corporate, or for the use of a body corporate, were void, unless sanctioned by charter, or act of assembly." 3 Binney's Rep. 626. See also, *Methodist Church v. Remington*, 1 Watts' Rep. 218. By the statute in Pennsylvania of 6th April, 1833, all purchases of land, by any corporation, or by any person in trust for one, without the license of the commonwealth, are made subject to forfeiture; and the same penalty extends to all lands, held by corporations existing in other states, either directly, or through the medium of trustees, or feoffees. (Purdon's Dig. 350.) But the Supreme Court of the United States has decided that a corporation of another state, authorized to purchase and hold lands in Pennsylvania, or elsewhere, is competent to purchase and hold lands in that state, subject, nevertheless, to be divested of the estate and a forfeiture of it, by the state of Pennsylvania, whenever that state thinks proper, to institute process for that purpose. The corporation holds a defeasible estate, if held without a license procured from Pennsylvania. *Runyan v. Lessee of Coster*, 14 Peters' Rep. 122.

In the other states, the statutes of *mortmain* are not in force. Our statute corporations, however, cannot take and hold real estate for purposes foreign to their institution. See 3 Pick. Rep. 232; 12 Mass. Rep. 537; Rev. Stat. of Mass., part 1, tit. 12, sec. 41; 4 Dana's Rep. 356; 8 Dana, 114; Civil Code of Louisiana, art. 1507.

Kent suggests (2 Kent's Com. 283,) that as we have no general statutes of *mortmain*, a legally constituted corporation in another state, might purchase and hold lands *ad libitum* in New York, provided their charter gave them competent power. The Supreme Court of Kentucky held, that a corporation of another state, or nation, might contract and sue on contracts made by its agent in Kentucky, provided they were such as its charter authorized, and consistent with the local law and policy of the state; and, that a corporation of another state might take and hold lands, by purchase, mortgage, or devise, when consistent with its charter, and not denied by positive law. *Lathrop v. Com. Bank of Scioto*, 8 Dana, 114.

"A corporation may take a mortgage upon land by way of security for loans made in the course, and according to the usage of its lawful operations; or, in satisfaction of debts previously contracted in the course of its dealing. Such acts are generally provided for in the charters of incorporation; and, without such a special authority, it would seem to be implied, in the reason and spirit of the grant, if the debt was *bona fide* created in the regular course of business." 2 Kent's Com. 283. *Silver Lake Bank v. North*, 4 Johns. Ch. Rep. 370; and, *Bard v. Bank of Washington*, 11 Serg. & Rawle, 411, cited.

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habitants of a place, or the parishioners or churchwardens of a parish, is bad ; so is a similar purchase by, or grant to, the commoners of a waste.(o)

Parochial corporations may purchase.

But, by custom, in London and some other places, the parson and churchwardens are a corporation to purchase land ;(p) and so, by statute, are churchwardens and overseers generally in some matters relating to the poor laws,(q) and to education.(r)

An alien cannot hold in person or by a trustee.

An alien, before denization, can purchase ; but, upon office found, the land belongs to the crown ;(s) and the crown can claim land vested in trustees for an alien ;(t) but not any part of the produce of sale of real estate, devised in trust to sell and to divide the purchase-money among aliens.(u)[1]

(o) Co. Litt. 3 a.

(p) Note 4 to Co. Litt. 3 a.

(q) 9 Geo. I. c. 7, s. 4 ; Sug. 883.

(r) Jointly with the minister ; see 4 & 5 Vict. c. 38, s. 8.

(s) Co. Litt. 2 b ; *Rex v. Holland*, Aleyn, 14.

(t) 1 Beav. 90.

(\*) *Du Hourmelin v. Sheldon*, 4 Myl. & Cr. 525 : and see p. 530, as to distinction between that case and *Fourdrin v. Gowdey*, 3 Myl. & K. 383.

[1] "The force of this rigorous doctrine of the common law," says Kent, (2 Kent's Com. 62,) "is undoubtedly suspended with us, in respect to the subjects of those nations with whom we have commercial treaties ; and, it is justly doubted whether the common law be really so inhospitable ; for, it is inconsistent with the established maxims of sound policy and the social intercourse of nations. Foreigners are admitted to the rights of citizenship with us on liberal terms, and as the law requires five, and only five years residence to entitle them, and their families to the benefits of naturalization, it would seem to imply a right, in the mean time, to the necessary use of real property ; and, if it were otherwise, the means would be interdicted which are requisite to render the five years residence secure and comfortable."

The Supreme Court of the United States held, in *Hughes v. Edwards*. 9 Wheaton, 839, that aliens might take a mortgage upon real estate, by way of security for a debt, and that the alien creditor was entitled to come into a court of equity to have the mortgage foreclosed, and the lands sold for the payment of his debt.

The terms upon which any alien, being a free white person, can be naturalized, are prescribed by the acts of Congress of the 14th of April, 1802, ch. 28 ; the 3d of March, 1813, ch. 184 ; the 22d of March, 1816, ch. 32 ; the 26th of May, 1824, ch. 186 ; and the 24th of May, 1828, ch. 116.

The claim of the crown extends to terms for years;(v) and, until recently, the only exception was of leases of "habitations of alien merchant friends during their lives and residence within the realm;(w) but leases, or agreements for a lease,(x) to alien artificers or handicraftsmen, were, prior to the 7 & 8 Vict. c. 66, absolutely void; although an assignment to an alien artificer of a subsisting lease has been held valid:(y) by the above act, however, a resident alien friend may hold any lands, houses, or other tenements, for the purpose of residence, or of occupation by himself or his servants, or for the purpose of any business, trade, or manufacture, for any term not exceeding twenty-one years, as if he were a natural-born subject.(z)

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Leases to, were formerly void.  
[\*9]

Exception under 7 & 8 Vict. c. 66, of 21 years' leases of premises for residence or trade.

By the Acts of 7 Anne, c. 5, Geo. II. c. 21, and 13 Geo. III. c. 21, the children of a male British-born subject, or of his son, are, with certain special exceptions,(a) to be considered natural-born subjects; and, by 7 & 8 Vict. c. 66, the child born of a British mother out of the Queen's allegiance, is rendered capable of holding land.(b)

Who entitled as a natural-born subject to hold land.

After denization, the alien can both purchase and beneficially hold land; and is entitled to land purchased before denization, if the Crown, before office found, has, by the letters patent of denization, confirmed his estate.(c)[1]

Denization, effect of.

Naturalization, for the purpose of holding land, could formerly be obtained only by a special Act of Parliament;(d) but, under the provisions of the 7 & 8 Vict.

Naturalization under 7 & 8 Vict. c. 66.

(v) Co. Litt. 2 b; *Rex v. Eastbourne*, 4 East, 107.

(w) 32 Hen. VIII. ch. 16, s. 13.

(x) *Lapierre v. M'Intosh*, 1 Per. & Dav. 629; 9 Add. & E. 857.

(y) *Wootton v. Steffenoni*, 12 Mees. & W. 129.

(z) Sect. 5 of Act.

(a) As to which, see the Acts, and *Fitch v. Weber*, 6 Hare, 51.

(b) Sect. 3 of Act.

(c) *Fourdrin v. Godey*, 3 Myl. & K. 383.

(d) As to naturalization in the colonies, see 10 & 11 Vict. c. 83.

[1] In this country, a person when naturalized, becomes entitled to all the privileges and immunities of natural born subjects, except that a residence of seven years is requisite to enable him to hold a seat in Congress, and no person, except a natural born citizen, is eligible to the office of governor in some of the states, or of president of the United States.

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c. 66,(e) any resident alien may petition the Secretary of State for the home department for a certificate of naturalization; upon obtaining which, and taking the oath of allegiance required by the Act, the alien, (so far as the possession \*and enjoyment of property are concerned, and subject to any special exceptions contained in the certificate,) acquires all the rights and capacities of a natural-born subject: a female alien, upon marriage to a natural-born or naturalized subject, becomes herself naturalized; (f) but this provision does not apply where the woman died before the passing of the act.(g)

Marriage of female alien to a natural-born subject.

Infant purchasing may elect when he comes of age.

An infant can purchase; but, on his attaining twenty-one, he may, at his option, adopt or abandon the contract; (h) and should he, either having attained twenty-one die without agreeing to it, or die under that age, the like privilege descends on his representatives.

What amounts to confirmation.

Any written instrument signed by the infant after attaining majority amounts to a ratification, if of such a nature as, if signed by an adult, would amount to an adoption of the act of a party professing to act as his agent; (i) and where a written ratification is proved, it lies on the infant to show, if he can, that, at the time of giving it, he had not attained majority.(j)

He may be bound by simple acquiescence.

And it is not essential that there should be any express ratification; mere acquiescence may suffice: for instance, occupation, or receipt of the profits by the infant, without dissent, for a short time after attaining his majority, would, it is conceived, be a confirmation of the transaction by election: (k) but in order to sustain an action for the purchase-money, there must be a ratification in writing.(l)

What time allowed for election.

No precise rule can be laid down as to the time within

(e) See sect. 6, *et seq.*

(f) Sect. 16.

(g) *Count De Wall's case*, 12 Jurist, 145.

(h) *Ketsey's case*, Cro. Jac. 320; Co. Litt. 2 b.

(i) *Harris v. Wall*, 1 Exch. Rep. 122.

(j) *Hartley v. Warton*, 3 Per. & Dav. 529.

(k) See Sug. 884; 8 Taunt. 42; *Cork and Bandon Railway Company v. Cazenove*, 11 Jur. 802; and *Newry and Enniskillen Railway Company v. Coombe*, 3 Exch. 716.

(l) 9 Geo. IV. c. 14, s. 5.



which the infant, after attaining majority, must make his \*election; it appears, however, that an unexplained acquiescence of three or four months, *(m)* or, probably, a shorter period, *(n)* in the case of a purchase, would amount to acquiescence; a fortnight would, it appears, be a reasonable time in which to elect. *(o)*

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[\*11]

And, although the infant may abandon the contract, and thus relieve himself from all unsatisfied liabilities under it, he cannot, it is said, recover money which he has actually paid, unless such payment were procured by fraud; *(p)* and his inability to restore the consideration, would be an additional bar to the action; for instance, where an infant paid a premium for a lease of business premises, and entered upon and occupied them, it was held, upon his attaining majority and repudiating the lease, that, whatever might be the general rule, he could not, under the circumstances, recover the premium, inasmuch as he had enjoyed a part of that term for which it formed the consideration; *(q)* and although, upon the purchase of the fee simple, the same decisive effect might not always be attributable to mere occupation, *(r)* it is conceived, that any act affecting the value of the estate, *e. g.*, the felling of ornamental timber, or the removal or alteration of buildings, &c., would be conclusive against his right to reclaim the purchase-money. [1]

Whether he can recover consideration money.

If, however, the infant had fraudulently represented himself to the vendor as an adult, it is conceived that

Fraudulent purchase by, relieved against, in equity.

*(m)* *Kelsey's case*, Cro. Jac. 320.

*(n)* See judgment in *Holmes v. Blogg*, 8 Taunt. 42; Park, J.

*(o)* 2 Durn. & E. 439.

*(p)* Macph. on Infants, 484; *Wilson v. Kearse*, 2 Pea. Ca. 196; see Chambers on Infancy, 431.

*(q)* *Holmes v. Blogg*, 8 Taunt. 508.

*(r)* See however *Blackburn v. Smith*, 2 Exch. R. 783.

[1] The infant cannot have the benefit of the contract on one side, without returning the equivalent, on the other. See *Badger v. Phinney*, 15 Mass. Rep. 359; *Roberts v. Wiggan*, 1 N. H. Rep. 73; *Roof v. Stafford*, 7 Cowen's Rep. 179; *Hamblett v. Hamblett*, 6 N. H. Rep. 339, per Parker, J.; *Contra*, *Shaw v. Boyd*, 5 Serg & Rawle Rep. 309. See Waterman's Am. Ch. Digest, vol. 2, p. 400.

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[\*12] Equity would relieve the vendor by restraining any action for a return of the purchase-money, (supposing such an action to be maintainable,) and would allow the vendor to avail himself of any collateral securities which he might hold for the payment of the unpaid part of the purchase-money ; but it could not enforce any security given by the purchaser personally during his infancy ; such being absolutely void.(s)[1]

Purchase by  
lunatic, how  
voidable.

A lunatic or idiot may purchase ; and according to the early authorities, cannot himself, though he recover his senses, avoid the transaction ; but it may be set aside by his Committee after inquisition ; or by his representatives after his decease, in any case except that of his having recovered his senses and agreed to the purchase ;(t) the present doctrine of the Courts seems, however, to be in accordance with what has been already stated with respect to contracts for sale by lunatics ;(u) in a modern case, a purchase of an estate in consideration of the release of a bond debt, was set aside at the suit of a legatee of the bond debt.(v)

Purchase by  
married wo-  
man voida-  
ble.

A married woman may purchase ; and, if she have separate property, she can, and perhaps even though she do not refer to it, bind it by a contract for purchase :(w) in other cases the purchase may be annulled by the husband ; and the purchase-money may be recovered by him in trover, unless she purchased by his authority ;(x) or it may

(s) Chambers on Infancy, 444.

(t) 2 Bl. Com. 292 ; Shelf. on Lunacy, 347.

(u) *Supra*, p. 4 ; see *Molton v. Camroux*, 2 Exch. R. 487 ; S. C. (in error) 18 L. J., N. S. Exch. 356.

(v) *Steed v. Calley*, 1 Keen, 620 ; and see S. C., as to evidence of insanity.

(w) Sug. 885 ; vide *infra*, Ch. XVIII.

(x) *Garbrand v. Allen*, 1 Ld. Raymond, 224.

[1] In the case of *Conroe v. Birdsall*, 1 John. Cas. 127, where an infant had fraudulently represented himself to be of age when he gave a bond, it was held that the bond was void at law ; and in *Stoolfoos v. Jenkins*, 12 Serg. & Rawle 399, it was suggested that there might be an instance of such gross and palpable fraud, committed by an infant arrived at the age of discretion, as would render a release of his right to land binding upon him.

be annulled by herself after his death, although he may have agreed to it; or by her representatives, unless she agreed to it after her husband's decease.<sup>(y)</sup> Chapter I.

The general rules above referred to, respecting acquiescence by an infant after majority, will, it is conceived, apply to the case of a married woman holding over after the termination of the coverture; and, in the case of a purchase by a married woman representing herself to be \*single, or who, contracting as if single, has so dealt with the property as to prevent its perfect restoration *in specie*, Equity would, it is conceived, secure to the vendor all his legal rights, and would restrain the exercise of any adverse legal right either by the married woman or her husband; (supposing him to have been privy to the fraud.) May be confirmed by acquiescence.  
[\*13] Fraudulent purchase by, relieved against.

Roman Catholics were formerly subject to disabilities in this respect, which have been removed by a modern statute.<sup>(z)</sup> Roman Catholics.

Persons guilty of the crime of treason, or felony, or who have incurred a præmunire, may, before judgment, purchase land; but, upon judgment, it will be subject to the rights of the Lord of the fee, or of the Crown; purchases by such persons after judgment are subject to the same rules as purchases by aliens before denization; (a) the capacity of a felon sentenced to transportation, is not restored until the term of transportation has expired.<sup>(b)</sup> Traitors, felons, &c.

So, upon a purchase by a bankrupt before obtaining his certificate; (c) or by an insolvent under the 1 & 2 Vict. c. 110, (d) before his final discharge; or by an insolvent under the 5 & 6 Vict. c. 116, (e) before his debts are paid Bankrupts and insolvents.

(y) Sug. 885; Co. Litt. 3 a.

(z) 10 Geo. IV. c. 7. As to the position of Roman Catholics with reference to land devoted to religious or charitable purposes, see 2 & 3 Will. IV. c. 115, and Anstey on Roman Catholics, p. 128, *et seq.*

(a) Co. Litt. 2 b.; Sug. 884.

(b) *Roberts v. Walker*, 1 Russ. & Myl. 752.

(c) See 6 Geo. IV. c. 16; and see now 12 & 13 Vict. c. 106, sect. 142.

(d) See sect. 37.

(e) See sect. 7. Insolvent debtors, under the 7 & 8 Vict. c. 70, seem to have been in the same position, as regards after-acquired property, as bankrupts; see sects. 8 and 13. Query as to the effect of the new Bankrupt Act upon the rights of assignees under the 7 & 8 Vict.?

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[\*14] in full, the land vests in the assignees ; and, according to the law as it existed before the passing of the recent Bankruptcy Law Consolidation Act, where the bankrupt's estate had not paid 15s. in the pound, and he had previously been bankrupt or discharged under an insolvent act, or had compounded with his creditors, the rights of \*the assignees were not affected by his certificate : (f) the recent act, which repeals the statute of Geo. IV., does not seem to contain any similar provision ; but it provides, That if any assignee indebted to the estate of which he is such assignee, in respect of money being part of the estate of the bankrupt retained or employed by him, become bankrupt, and obtain his certificate, it shall have the effect only of freeing his person from arrest and imprisonment, but his future effects (except tools, &c.) shall remain liable for so much of his debt to the estate of which he was assignee as shall not be paid by dividends under his bankruptcy, and for interest at the rate of five per cent. per annum on the whole debt : (g) and it also contains clauses, which enable any creditor or assignee of a bankrupt, to apply for the recall of the certificate on good cause shown at any time within six months after its allowance ; (h) or at any subsequent period, in case the same shall appear to have been obtained on false evidence, or by reason of an improper suppression of evidence, or otherwise by means of fraud. (i)

Insolvent.

And, in the case of an insolvent under the 1 & 2 Vict. c. 110, although property acquired by him after his final discharge does not vest in his assignees, it still remains, until his debts are paid in full, (j) subject to the judgment which is directed by the 87th sect. to be entered up against him.

(f) 6 Geo. IV. c. 16, s. 127.

(g) Sec. 12 & 13 Vict. c. 106, s. 156.

(h) Sect. 203.

(i) Sect. 207.

(j) See sect. 92.

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\*(4.) *As to incapacities of the 2nd description affecting purchasers.*

As to who are relatively incompetent to purchase.

The remarks which we have already made, (k) as to undue personal influence, seem to be as applicable to purchasers as to vendors.

It is also a general rule in equity, that no person "who by being employed or concerned in the affairs of another has acquired a knowledge of his property," (l) or who, in respect of the property to be sold, has a duty to perform which is inconsistent with the duty or interest of a purchaser, (m) shall himself purchase such property; nor shall he purchase for himself in another's name; nor shall he himself purchase as agent for another; (n) nor, perhaps, even employ a third person to buy as agent for another; (o) the rule, however, is subject to particular qualifications hereinafter mentioned. [1]

Persons filling a fiduciary character.

(k) Page 7.

(l) Sug. 887; *Ahearne v. Hogan*, 1 Dru. 310.

(m) *Greenlaw v. King*, 3 Beav. 49.

(n) 9 Ves. 248.

(o) Sug. 890.

[1] "In all cases of principal and agent, the principal contracts for the aid and benefit of the skill and judgment of the agent; and the habitual confidence reposed in the latter, makes all his acts and statements possess a commanding influence over the former. Indeed, in such cases, the agent too often so entirely misleads the judgment of his principal, that while he is seeking his own peculiar advantage, he seems but consulting the advantage and interests of his principal. Upon these principles, if an agent sells to his principal, his own property, as the property of another, without disclosing the fact, the bargain, at the election of the principal, will be held void. So, if an agent, employed to purchase for another, purchases for himself, he will be considered as the trustee of his employer. Therefore if a person is employed, as an agent, to purchase up a debt of his employer, he cannot purchase the debt upon his own account, for he is bound to purchase it, at as low a rate as he can; and he would otherwise be tempted to violate his duty. The same rule applies to a surety who purchases up the debt of his principal. And therefore, in each case, if a purchase is made of the debt, the agent or surety can entitle himself, as against his principal, to no more than he has actually paid for the debt." 1 Story's Eq. Juris. secs. 315, 316. See 1 Fonbl. Eq. B. 1, ch. 3, sec. 12; 1 Mason Rep. 341; 2 Mason, 369; 1 John. Ch. Rep. 27; 1 John. Ch. Rep. 394.

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Purchase by,  
invalid,  
although by  
auction, or  
before the  
Master.

Nor is such a purchase rendered valid by the fact of the sale having been by auction, or before the Master under a decree of the Court ;(*p*) nor, in the case of a person who by filling a confidential situation has acquired a knowledge of the property, is his capacity to purchase restored by his previous retirement from such situation ;(*q*) for his knowledge remains.

Rule affects  
purchases by  
Agents.

The rule has been held to apply to the several cases of  
An agent for sale :(*r*)

[\*16]

An agent for the management of property ; who can  
\*only purchase subject to the onus of proving that he afforded his principal all the knowledge respecting its value which he derived as agent :(*s*)

Arbitrators :

An arbitrator, contracting for unascertained claims of parties to the reference :(*t*)

Assignees :

An assignee of a bankrupt ; against whom the rule is more than ordinarily stringent ;(*u*) and it extends to a purchase by his partner on behalf of the firm ;(*v*) the court has, however, on the petition of a purchasing assignee, directed a reference to the commissioners to inquire whether the purchase would be for the benefit of the estate, he

(*p*) Sug. 891.

(*q*) *Carter v. Palmer*, 8 Cl. & Fin. 657.

(*r*) *York Buildings Company v. Mackenzie*, 8 Bro. P. C. 42 ; *Woodhouse v. Meredith*, 1 Jac. & W. 204 ; *Barker v. Harrison*, 2 Coll. 546 ; *Charter v. Trevelyan*, 11 Cl. & Fin. 714 ; *In re Bloy's Trust*, 1 Mac. & G. 489 ; *et vide infra*, as to Solicitors and Agents.

(*s*) *Cane v. Lord Allen*, 2 Dow. 289 ; *Molony v. Kernan*, 2 Dru. & W. 31 ; and see *Rossiter v. Walsh*, 4 Dru. & W. 485 ; *Murphy v. O'Shea*, 2 Jo. & L. 422.

(*t*) *Blennerhassett v. Day*, 2 Ball. & B. 116.

(*u*) *Ex parte Lacey*, 6 Ves. 630 ; *Ex parte Bennett*, 10 Ves. 395 ; *Ex parte Alexander*, 2 Mon. & Ay. 492 ; *Turner v. Trelawny*, 12 Sim. 49.

(*v*) *Ex parte Burnell*, 7 Jur. 116.

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"In all cases of purchases and bargains, respecting property, directly and openly made between principals and agents, the utmost good faith is required. The agent must conceal no facts within his knowledge which might influence the judgment of his principal, as to the price or value ; and if he does, the contract will be set aside. The question, in all such cases, does not turn upon the point whether there is any intention to cheat or not ; but upon the obligation, from the fiduciary relation of the parties, to make a frank and full disclosure." *Ib.* sec. 316. See *Farnam v. Brooks*, 9 Pick. Rep. 212.

paying all the costs; (w) and, on the report being favorable, has confirmed the sale: (x) it has also, under special circumstances, allowed an assignee to be removed, at his own request, in order that he might bid at the sale of the bankrupt's estate: (y) where, however, an assignee, who was also second mortgagee of the property, applied for leave to bid, (remaining assignee,) the court refused the application; but allowed him to name a price at which he might take the property if not sold at the auction: (z)[1]

An auctioneer employed to sell the property. (a)

Auctioneers.

(w) *Ex parte Gore*, 6 Jur. 1118; 3 Mon. D. & De G. 77.

(x) *S. C.*, 7 Jur. 136.

(y) *Ex parte Perkes*, 3 Mon. D. & De G. 385.

(z) *Ex parte Holyman*, 8 Jur. 156.

(a) Sug. 887.

[1] A trustee is not permitted to purchase of his *cestui que trust* unless there is a clear and distinct contract, ascertained to be such, after a careful investigation into all the circumstances, and it is ascertained that the *cestui que trust* intended that the trustee should buy, and that no fraud, concealment or advantage have been taken by the trustee of information acquired by him as trustee. If a trustee, though honest, should buy for himself an estate of his *cestui que trust*, and then should sell it for more, according to the rules of a court of equity, from general policy and not from any peculiar imputation of fraud, he would be held still to remain a trustee to all intents and purposes, and not be permitted to sell to or for himself. 9 Ves. 246; 2 Bro. Ch. Rep. 400; 6 Ves. 277; 3 Ves. 740; 5 Ves. 678; 2 Atk. Rep. 59; 2 Brown Ch. Rep. 400; S. C. 2 Cox Rep. 320, 327; 1 Peter's C. C. Rep. 367, 368; S. C. 6 Wheat. Rep. 481.

To entitle the *cestui que trust* to relief it is not always necessary to show that the trustee has made some advantage, where there has been a purchase by himself; nor is the sale to the trustee good, unless some advantage has been made. The principle applies, however innocent the purchase may be in a given case. The *cestui que trust* is not bound to prove, nor is the court bound to decide, that the trustee has made a bargain advantageous to himself. In all cases, where a purchase has been made by a trustee on his own account, of the estate of his *cestui que trust*, it is in the option of the *cestui que trust* to set aside the sale, whether *bona fide* made or not. And the doctrine applies not only to trustees strictly so called, but to other persons standing in like situation; such as assignees and solicitors of a bankrupt or insolvent estate who are never permitted to become purchasers at the sale of the bankrupt or insolvent estate. See *Davoue v. Fanning*, 2 John. Ch. Rep. 252; *Farnam v. Brooks*, 9 Pick. Rep. 202.

## Chapter I.

Bishop  
whose con-  
sent was  
required to  
sale.

A bishop purchasing an annuity to be charged upon a rectory ; he being the person whose consent was required to the sale ; although giving a better price than could have been elsewhere obtained :(b)

[\*17]

Commis-  
sioners in  
bankruptcy.

\*A commissioner of bankrupts,(c) although he had ceased to act in the prosecution of the fiat :(d)

Commis-  
sioners for  
inclosure :

and valuers.

Commissioners for Inclosure under the general inclosure act ; who cannot purchase *any* land in a parish in which an inclosure is made, until five years from the date and execution of their award :(e) and a similar disability for the term of seven years affects valuers acting under the commons inclosure act :(f)

Committee  
of Lunatic.

The committee of a lunatic's estate ; the court has even refused to confirm a lease to the committee though approved by the master as advantageous to the estate :(g)

Counsel.

Counsel, who purchased, below their nominal value, charges upon his late client's estate,(h) upon the validity of which he had advised :

Creditor of  
bankrupt  
who had ad-  
vised as to  
sale.  
Executors  
and adminis-  
trators.

A creditor of a bankrupt, who had been consulted by the assignees as to the best mode of selling the estate :(i)

Executors and administrators, in respect of the personal estate of the deceased :(j)[1]

Guardians.

A guardian, purchasing from his ward, immediately

(b) *Greenlaw v. King*, 3 Beav. 49.

(c) *Ex parte Bennett*, 10 Ves. 381.

(d) *Ex parte Baynton*, 7 Jur. 244.

(e) 41 Geo. III. c. 109, s. 2.

(f) 8 & 9 Vict. c. 118, s. 129.

(g) Shelf. on Lunacy, p. 446.

(h) *Carter v. Palmer*, 8 Cl. & Fin. 657.

(i) *Ex parte Hughes*, 6 Ves. 617.

(j) *Killick v. Flexney*, 4 Bro. C. C. 161 ; *Walson v. Toone*, 6 Madd. 153.

[1] Executors and administrators are not permitted to purchase up the debts of the deceased on their own account ; but, whatever advantage is thus derived by them, by purchases at an under value, is for the common benefit of the estate. Indeed, executors or administrators ought not, under any circumstances, to derive a personal benefit from the manner in which they transact the business, or manage the assets of the estate. *Schieffelin v. Stewart*, 1 John. Ch. Rep. 620 ; *Brown v. Brewerton*, 4 Johns. Ch. Rep. 303 ; *Evanson v. Tappan*, 1 John. Ch. Rep. 497 ; *Hawley v. Mancius*, 7 Johns. Ch. Rep. 174.



on his coming of age; although the price was adequate: (k) [2] Chapter I.

A governor of a charity, taking a lease of the charity lands: (l) Governor of charity.

A mortgagee with a power of sale; who cannot purchase, under the power, either in his own name or through an agent: nor can his agent, who has acted in surveying the property and receiving the interest, purchase on his own account from the mortgagee; (m) but the rule does not apply to a purchase of the equity of redemption by the mortgagee from the mortgagor; (n) it is, however, usual, although perhaps not strictly necessary, upon a sale under the general order in bankruptcy, for a mortgagee intending to bid, to apply for leave so to do; (o) in the case of a legal mortgage, it appears to have been a common, although improper practice, for the mortgagee to conduct the sale; (p) in such a case, of course, he could not purchase without the permission of the court: Mortgagee. [\*18] Who may, however, purchase from the mortgagor. Permission for, to bid, whether requisite on sale in bankruptcy.

A rector purchasing, in the name of his curate, a portion of glebe sold for the redemption of the land-tax: (q) Rector buying glebe.

(k) See Sug. 892.

(l) *Attorney General v. Lord Clarendon*, 17 Ves. 491.

(m) *Orme v. Wright*, 3 Jur. 19; *In re Bloyes' Trust*, 1 Mac. & G. 488; and see *Downes v. Grazebrook*, 3 Mer. 200.

(n) Sug. 888; and see *Waters v. Groom*, 11 Cl. & Fin. 684; *Knight v. Marjoribanks*, 2 Mac. & G. 10.

(o) Sug. 889, and cases cited. The costs of an application merely for leave to bid, are, it appears, allowed to the mortgagee only when the petition is presented at the request of the assignees; *Ex parte Coort*, 7 Jur. 864; *Ex parte Danks*, 12 L. J., N. S. 45; *Ex parte Smith*, 13 Jur. 1044. In a case of *Ex parte Pedder*, 1 Mon. & Ayr. 327, the court, after the sale, made an order for the mortgagee to bid, *nunc pro tunc*; to which Sir Edward Sugden adds a query; but a similar order seems to have been made in the recent case of *Ex parte Yorke*, 3 Mon. D. & De G. 329.

(p) See *Ex parte Cuddon*, 3 Mon. D. & De G. 302.

(q) *Grover v. Hugell*, 3 Russ. 428.

[2] The relative situation of guardian and ward, imposes a general inability to deal with each other. Courts of equity will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased and the relation become thereby actually ended, if the intermediate period be short, unless the circumstances show full deliberation on the part of the ward, and good faith on the part of the guardian.

- Chapter I.** A solicitor to a commission of, or fiat in, bankruptcy, purchasing the estate from the commissioners ;(*r*) and a solicitor conducting a sale under a decree and purchasing the estate :(*s*) and the solicitor or agent of a person disqualified from purchasing, would, it is conceived, in general, be unable to purchase on his own account :(*t*) but, in a recent case, under special circumstances, the solicitor to a fiat was allowed to purchase part of the estate :(*u*)
- Solicitor to Fiat.**
- Solicitor of disqualified purchaser.**
- Steward.** A steward contracting for a lease from his employer, [\*19] \*to sustain which, he must show the fairness of the transaction :(*w*)
- Trustees.** Trustees, unless merely such in name, (*x*) can only purchase subject to special restrictions :(*y*) and there will be an additional objection to a purchase by a trustee, if the object of the trust were apparently to secure to the *cestui que trust* a continuing control over the property :(*z*)
- Who have accepted trust.** But, of course, the mere fact of a person having been named as a trustee will not affect his capacity to purchase, if he decline the trust *ab initio* ; and, it is not essential that he should execute a deed of disclaimer :(*a*)
- Trustees for purchase.** A trustee whose duty it is to purchase particular property for his *cestui que trust*, (e. g. : a trustee of renewable leaseholds, bound, if possible, to renew,) shall never buy it for himself ; even though the proposed vendor positively refuse to part with it for the benefit of the *cestui que trust*. (*b*)
- Incompetent purchaser bound at option of parties interested.** But, in all the above cases, the transaction is binding on the purchaser ; and voidable merely at the option of
- (*r*) *Ex parte Bennett*, 10 Ves. 381.  
 (*s*) *Sidney v. Ranger*, 12 Sim. 118.  
 (*t*) *Downes v. Grazebrook*, 3 Mer. 209 ; *Whitcomb v. Minchin*, 5 Mad. 91 ; *In re Bloyes' Trust*, 1 Mac. & G. 488 ; but see *Alvanley v. Kinnaird*, 2 Mac. & G. 17.  
 (*u*) *Ex parte Watts*, 1 De G. 265.  
 (*w*) See *Ford Selsey v. Rhoades*, 2 Sim. & St. 49 ; 1 Bl. N. S. 1.  
 (*x*) See *Waters v. Groom*, 11 Cl. & Fin. 684 ; where the question was, whether the purchaser was a trustee, or merely a creditor holding security.  
 (*y*) As to which, *vide infra*, p. 21.  
 (*z*) *Scott v. Davis*, 4 Myl. & Cr. 87, 90.  
 (*a*) *Stacey v. Elph*, 1 M. & K. 195.  
 (*b*) *Ex parte Bennett*, 10 Ves. 395 ; see *Turner v. Trclawny*, 12 Sim. 49.

the parties originally interested in the property, or their representatives. Chapter I.

On the other hand—

An execution creditor may buy the property sold under the execution : (c)

Rule does not affect execution creditor.

A solicitor, generally, is under no positive disability to purchase from his client; but, if the transaction be impeached, he must prove its fairness; and, that he gave his client all the information respecting the subject of the purchase which he himself possessed: but, he need not have pointed out a mere speculative advantage, (such as the possibility of an unplanned, though contemplated railroad, running near the property,) which might be reasonably supposed to be equally in the knowledge of both parties : (d) nor does the fact of the consideration having in part consisted of costs necessarily invalidate the transaction ; (e) nor does the rule extend to prevent a purchase, by a solicitor, of his client's property in respect of which he has not been professionally employed ; (f) or, his purchasing by auction his client's property if he have not acted for him professionally in respect of the sale. (g) [1]

General rule as to competency of solicitor to purchase.

[\*20]

The son or other relation of a trustee or other disqualified person, may purchase *bona fide* on his own account; and, although, in the case of a trustee selling to a relation, the relationship is calculated to excite suspicion, which, if confirmed by any other circumstance, it would require a very strong case to remove, (h) the court will, in the ab-

Son of disqualified purchaser.

(c) *Stratford v. Twynam*, Jac. 418.

(d) See *Edwards v. Meyrick*, 2 Ha. 60, where the earlier cases are cited and reviewed: see *Rudd v. Swell*, 4 Jur. 882, C.; and *Thomas v. Phillips*, 11 Jur. 80.

(e) *Edwards v. Meyrick*, *ubi supra*.

(f) 2 Y. & C. Exch. 520; 2 Ha. 68.

(g) *Austin v. Chambers*, 6 Cl. & Fin. 1.

(h) See *Ferraby v. Hobson*, 2 Ph. 261.

[1] The burthen of establishing the perfect fairness of a transaction between attorney and client, is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence. If no such proof is established, courts of equity treat the case as one of constructive fraud.

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sence of fraud, even decree specific performance at the suit of the purchaser.(i)

Tenant for life on sale by Trustees with his consent.

A tenant for life under a settlement, whose consent is requisite to the exercise of a power of sale by the trustees, may, nevertheless, purchase from them under the power;(k) but, this is an avowed exception from the general rule; and was so decided by Lord *Eldon*, on the ground of its being dangerous to unsettle the practice of conveyancers.(l)

[\*21]

As to purchase by trustees—different kinds of trust.

\*A trustee may either simply, though expressly, hold the property in trust for others; or, although not nominally a trustee, he may yet owe duties to others in respect of it which invest him with a fiduciary character in the contemplation of the court; or he may actually hold it in trust to effect a sale.

So, his *cestuis que trust* may be either *sui juris*, or the contrary,—as infants, married women, &c. &c.

Dry trustees may purchase.

It does not appear that the rule against purchasing affects mere dry trustees; *e. g.*: a trustee to preserve contingent remainders,(m) or (it is conceived) a trustee to bar dower, or of a term for years assigned to attend the inheritance, or of a mere outstanding legal estate, or, in fact, a trustee of any description who cannot possibly derive in the transaction any advantage from his fiduciary character.(n)

Purchase by active trustees from *cestui que trust* may be valid.

Test of validity.

Nor is a trustee who comes within the restrictive rule incapable of purchasing from the *cestuis que trust*, if they be *sui juris*; but, in any such case, the court looks at the transaction with a jealous eye;(o) and the question to be determined is, not whether the price is fair, but whether the purchaser, having held a confidential situation previously to the purchase, has, at the time of the purchase, shaken off that character, by the consent of the

(i) Sug. 892; see *Coles v. Trecothick*, 9 Ves. 134.

(k) *Howard v. Ducane*, Turn. & R. 81.

(l) Turn. & R. 86 and 87; 3 Russ. 432.

(m) 11 Ves. 226.

(n) See 1 Sim. & St. 567.

(o) *Davidson v. Gardner*, Sug. 890.

*cestui que trust*, freely given, after full information, and has bargained for the right to purchase.(p) Chapter I.

So, where the sale by auction is, in fact, conducted by the *cestui que trust*, a purchase at an adequate price by the trustee for sale may, perhaps, be supported.(q)

In the case of a trust for the benefit of creditors, there is little doubt that the consent of the majority will not \*bind the minority, so as to render valid a purchase by the trustee for sale.(r)

The solicitor of a *cestui que trust* has no general authority to authorize a purchase by the trustee.(s)

A trustee cannot get rid of his incapacity by resigning the trust or confidential situation; for he would still retain the knowledge he had acquired while in office.(t)

And the circumstance of a trustee or agent purchasing in the name of a third person is indicative of fraud, and the sale will more readily be set aside.(u)

Where the *cestuis que trust* or any of them are not *sui juris*, a purchase by a trustee, who comes within the restrictive rule, can be safely effected only under an order of the court; which order will not be made unless to the evident advantage of the trust;(v) and it is presumed that he would have to pay the costs of the suit.

We may next consider the nature of the risk incurred by the trustee or other person purchasing while under any incapacity of the second description.

1st, He may be required to reconvey the estate, supposing he has not sold it.(w)

2ndly, He may be obliged to let it be put up to sale, and to reconvey to another purchaser if a better can be found; but if not to keep it.(x)

Sale apparently by trustee, but substantially by *cestui que trust*, whether valid. Purchase by creditors' trustee, with consent of majority, invalid.

[\*22]

Solicitor of *cestui que trust* cannot consent to the purchase.

Resignation of trust once accepted immaterial.

Purchase in name of another suspicious.

Purchase by decree, if *cestuis que trust* are under disability.

Risk incurred by disqualified purchaser.

He may be forced to reconvey;

or let the estate be resold;

(p) Per Lord Eldon, *Ex parte James*, 8 Ves. 533.

(q) See *Coles v. Trecothick*, 9 Ves. 234.

(r) Sug. 895; 6 Ves. 628.

(s) *Downes v. Grazebrook*, 3 Mer. 209.

(t) 8 Ves. 352; and see *Carter v. Palmer*, 8 Cl. & Fin. 657.

(u) *Lord Hardwicke v. Vernon*, 4 Ves. 411; *In re Bloyes' Trust*, 1.

(v) See 5 Ves. 681.

(w) 6 Ves. 627.

(x) *Ex parte Reynolds*, 5 Ves. 707.

## Chapter I.

or to account  
for profit if  
he has sold.

Sub-pur-  
chaser with  
notice is  
similarly  
liable.

[\*23]

Terms upon  
which a re-  
conveyance  
will be de-  
creed.

What ex-  
penses al-  
lowed.

Profits to be  
accounted  
for.

If anything  
due to him  
he must at  
once recon-  
vey.

What allow-  
ances for  
buildings  
pulled down.

Must recon-  
vey at once  
unless de-  
cree gives  
him a lien  
for balance  
due.

3rdly, If he have resold it at a profit, he may be re-  
quired to account for such profit.(y)

And a sub-purchaser, buying with notice of the cir-  
cumstances creating the incapacity in the original pur-  
chaser, \*is in the same predicament, if the sale be im-  
peached.(z)

In the first of the above cases, the purchaser will be  
credited with his original purchase money and interest at  
£4 per cent., and all sums expended by him in substan-  
tial improvements, (unless he have been guilty of actual  
fraud,)(a) (as, in one case, buildings erected, and inclo-  
sures made,)(b) or in repairs ;(c) and interest from the  
time of the advances ; and will be debited with rents re-  
ceived by him, an occupation rent for any part occupied  
by himself,(d) and his receipts for the sale of timber, &c.  
with interest ; and, also, with the estimated amount of  
deteriorations, (if any ;)(e) and on receiving the balance,  
(if in his favor,) he must reconvey.

And if nothing appear to be due to him, he must give  
up his purchase without receiving any further considera-  
tion.(f)

In making the above estimates, buildings pulled down,  
will, if incapable of repair, be valued as old materials, but  
otherwise as buildings standing.(g)

Where the decree directs a reconveyance, and an ac-  
count and payment of the balance to the purchaser, but  
does not in terms give him a lien for such balance upon  
the estate, the reconveyance must be made at once, with-  
out waiting for the accounts.(h) ,

(y) *Fox v. Macreth*, 2 Bro. C. C. 400.

(z) Sug. 899.

(a) *Baugh v. Price*, 1 Wils. 320 ; see *Hovell v. Hovell*, 2 Myl. & Cr. 478 ; and *Turner v. Trelawny*, 12 Sim. 49.

(b) *York Buildings Company v. Mackenzie*, 8 Bro. P. C. ; see pp. 56 and 71.

(c) Necessary repairs are allowed for, even in cases of fraud ; 1 Wils. 323.

(d) *Ex parte James*, 8 Ves. 351.

(e) *Ex parte Bennett*, 10 Ves. ; see p. 401.

(f) *Greenlaw v. King*, 3 Beav. 63.

(g) *Robinson v. Ridley*, 6 Madd. 2.

(h) *Trevelyan v. Charter*, 9 Beav. 140.

The estate, if put up for resale, will be put up at the amount of balance due to the purchaser, ascertained as just \*mentioned,(i) and, if there be no advance, he must keep the estate: in a modern case, where permanent improvements had been made, it was put up at its improved value, subject to the question whether he should be allowed the amount of such improvements.(j)

Chapter I.

Terms on which estate will be re-sold.

If no advance, purchaser must keep it.

At what amount put up. \*

In the case of a resale, the *cestuis que trust* cannot, if the estate were bought in one lot, insist on its being put up in several lots,(k) nor, it is conceived allotted otherwise than as it was bought; to affect the change they must take it off the purchaser's hands on the terms we have already mentioned.(l)

Cannot be re-allotted for sale.

[\*24]

The third rule would extend to a purchaser who, by sale of wood, minerals, &c. had more than repaid himself his purchase money, expenses, and interest;(m) or who had made a similar profit by merely letting the property, (which in the case of unexpected public improvements might often easily happen in the course of a few years, although the original price were perfectly fair;) it is apprehended, that, in either of these cases, he would have, not only to reconvey, but also to pay the balance found due from him.(n)

Purchaser having more than repaid himself must account for the balance.

If, in any of the above cases, the purchaser has paid purchase-money into court, and it has been invested, he will neither gain nor suffer by a rise or fall in the funds.(o)

Purchaser paying money into court not affected by variation in funds.

And, as a general rule, a trustee, though free from fraud, must pay the costs of a suit occasioned by his improper dealing with the estate:(p) such is the almost invariable practice where the *cestuis que trust* are infants;(q) in other \*cases, however, the rule is sometimes relaxed [\*25]

General rule as to costs.

(i) *Vide supra*, p. 23; *Ex parte Hughes*, 6 Ves. 617.

(j) *Williamson v. Seaber*, 3 Y. & C. 717.

(k) 8 Ves. 351.

(l) *Supra*, p. 23.

(m) *York Buildings Company v. Mackenzie*, 8 Bro. P. C. see p. 71.

(n) *S. C.*, and see 6 Ves. 622; and the decree in *Neesom v. Clarkson*, 2 Ha. 176; 4 Ha. 97.

(o) 8 Ves. 351.

(p) Sug. 898.

(q) See *Sanderson v. Walker*, 13 Ves. 601.

<sup>1</sup>Chapter I. where the trustee is free from all moral blame ;(*r*) and in one instance it would seem that he was even allowed to receive a sum on account of costs.(*s*)

Time allowed for impeaching sale.

But a *cestui que trust* wishing to impeach a sale must do so within a reasonable time ;(*t*) which generally is less than the time allowed by the statute of limitations : a delay of eighteen years has been held to amount to an implied confirmation of the transaction ;(*u*) ten years have been allowed in the case of an individual ;(*v*) and twelve in the case of creditors ;(*w*) but, the general tendency of modern decisions is still further to discourage stale demands ; a longer time, however, is allowed a class of persons, as creditors, than would be allowed an individual.(*x*)

Classes more favored than individuals.

From what period time begins to run.

And time will not run against a *cestui que trust* until he be *sui juris*.(*y*) and aware that the trustee was improperly the purchaser ;(*z*) nor will it, in general, run against him, so long as his interest is contingent, or reversionary,(*a*) or (in particular) dependent on the will of the purchasing trustee, or of a party implicated in the breach of trust :(*b*) it does not appear that the poverty of the *cestui que trust* is in itself an excuse for *laches*.(*c*) although it would, probably, have an effect upon the court if united with other circumstances.(*d*)

[\*26]

Confirmation of voidable purchase requisite to.

\*Lastly, a *cestui que trust* may confirm a voidable pur-

(*r*) *Baker v. Carter*, 1 Y. & C. Ex. 250.

(*s*) See *Downess v. Grazebrook*, 3 Mer. 209.

(*t*) 1 Jac. & W. 59 ; *Lord Selsey v. Rhoades*, 1 Bl. N. S. 1 ; *Rudd v. Sewell*, 4 Jur. 882, C.

(*u*) *Gregory v. Gregory*, G. Coop. 201 ; Jac. 631.

(*v*) *Hall v. Noyes*, cited 3 Ves. 748.

(*w*) *Anon.* cited 6 Ves. 632.

(*x*) *Whichcote v. Lawrence*, 3 Ves. 740.

(*y*) *Lewin on Trusts*, 371 ; *Campbell v. Walker*, 5 Ves. 678, 682.

(*z*) *Chalmer v. Bradley*, 1 Jac. & W. 51 ; *Charter v. Trevelyan*, 11 Cl. & Fin. 714.

(*a*) *Duke of Leeds v. Lord Amherst*, 2 Ph. 117 ; *Bennett v. Colley*, 5 Sim. 181 ; *Bowen v. Evans*, 1 Jo. & L. 178 ; *Roberts v. Tunstall*, 4 Ha. 257.

(*b*) *Roberts v. Tunstall*, 4 Ha. 257.

(*c*) S. C.

(*d*) *Gregory v. Gregory*, G. Cooper, 201 ; and see *Oliver v. Court*, 8 Pri. 168.



chase by his trustee, &c.; but, to make his confirmation binding, he must be *sui juris*,<sup>(e)</sup> fully aware of the material facts,<sup>(f)</sup> and that he can, if he please, impeach the transaction;<sup>(g)</sup> he must be under no undue influence,<sup>(h)</sup> the confirmation must be a solemn and deliberate act,<sup>(i)</sup> free from any pressure resulting from the original transaction,<sup>(j)</sup> and, in the case of a plurality of *cestuis que trust*, it must, to be effectual, be the act of all,<sup>(k)</sup> as a majority cannot bind the minority.

And we may here remark, that conduct, or language, on the part of a *cestui que trust* who is *sui juris*, and which, if it had occurred upon or previously to the commission of the breach of trust might have amounted to acquiescence, and have precluded him from all right of complaint, may, if it occur subsequently to the breach of trust, be wholly insufficient to confirm the transaction, or to release the trustee from liability.<sup>(l)</sup>

Distinctions between prior acquiescence and subsequent confirmation.

(e) *Campbell v. Walker*, 5 Ves. 678, 682.

(f) *Chalmer v. Bradley*, 1 Jac. & W. 51; see *Wedderburn v. Wedderburn*, 4 Myl. & Cr. 41.

(g) 1 P. Wms. 727.

(h) *Lewin on Trusts*, 374.

(i) *Carpenter v. Heriot*, 1 Ed. 338; see *De Montmorency v. Devereux*, 7 Cl. & Fin. 188.

(j) *Wood v. Downes*, 18 Ves. 128.

(k) 6 Ves. 628.

(l) 5 Myl. & Cr. 218; and see 2 Ph. 123.

Chapter II.

\*CHAPTER II.

AS TO SALES BY FIDUCIARY VENDORS.

1. *As to the time of sale.*
2. *The manner of sale.*
3. *The consideration.*
4. *General points relating to sales by fiduciary vendors.*

On sales by  
fiduciary  
vendors.

UNDER the term, fiduciary vendors, we may comprise agents for sale, assignees of bankrupts and insolvents, mortgagees with powers of sale, persons selling under the special authority of railway and other acts of parliament, and, in particular, of the lands clauses consolidation act, 1845, (and who may be conveniently described by the general appellation of statutory owners,) and, lastly, trustees selling in pursuance of either an express trust or only a permissive power;—the term, trustees, being also held to include executors, when selling freeholds or copyholds in exercise of a power expressed or implied, and personal representatives generally, when selling the chattels real of their testator or intestate.

As to time,  
considera-  
tion for, and  
manner of  
sale.

We may consider sales by such vendors, with reference to the questions, When ought they to sell? How ought they to sell? and, For what price ought they to sell? and then refer to some points which cannot conveniently be classed under any of the above heads.

As to time  
for sale.

(1) *When ought they to sell?*

By agents.

An agent for sale, should, subject to a reasonable exercise of discretion, sell with all convenient speed.

[\*28]

Assignees of  
bankrupts:  
single cred-  
itor may in-  
sist on sale.

\*Assignees of a bankrupt should also sell without any unnecessary delay;(a) and any single creditor may insist on a sale; and, if he so insist, it is doubtful whether the court can refuse its assent;(b) until creditor's assignees

(a) *Ex parte Goring*, 1 Ves. jun. 169.

(b) *S. C.*; and see 6 Ves. 623; *Ex parte Miller*, 1 Mon. D. & De G. 44.

are chosen, the official assignee alone may sell under the order of the court, if the court consider that delay would be prejudicial to the bankrupt's estate; after creditors' assignees are chosen, the official assignee is not to interfere in directing the time or manner of effecting a sale. (c)[1] Chapter II.

An assignee of an insolvent, under the 1 & 2 Vict. c. 110, must, in the absence of special direction by the court, sell, if practicable, within six (lunar) months after his appointment; (d) but a sale is not necessarily invalid by reason of its being made after such period has elapsed. (e) Assignees of insolvent.

A mortgagee with power of sale may sell without waiting for the concurrence of the mortgagor; nor does a stipulation in the mortgage deed that the mortgagor shall, if required, join in any sale, entitle a purchaser to require his concurrence. (f)[2] Mortgagees. Statutory owners.

(c) 12 & 13 Vict. c. 106, s. 40; and as to estate of insolvents petitioning under 5 & 6 Vict. c. 116, see 7 & 8 Vict. c. 96, s. 10.

(d) See s. 47; and see last note.

(e) *Mather v. Priestman*, 9 Sim. 352; *Cole v. Coles*, 6 Hare, 517.

(f) *Corder v. Morgan*, 18 Ves. 344.

[1] The usual discretion is to sell with all convenient speed, which is no more than the ordinary duty implied in a trustee, and there must necessarily be some discretion, which the trustee may safely exercise. If there are several trustees, one is not bound to surrender his opinion as to the fittest time of sale, to the other; and, acting providently, they may buy in the estate; but trustees who do buy in an estate and delay the re-sale, incur a great risk of answering for any loss which may be sustained. Sug. on Vend. vol. 1, p. 63.

The court has refused to stay the sale by trustees, although to be made the next day, and notice of the intended sale, was alleged to be much shorter than usual. *Ib.*

[3] Where the trust for sale was in the mortgagee, the court thought the mortgagor might, when due notice had not been given, so as to afford a fair probability of an advantageous sale, relieve himself, by giving notice to the purchaser that he had filed a bill to impeach the sale, and that it was better to put him to the inconvenience of an additional party to his suit than to risk a possible injury to the mortgagee, by interrupting the sale. Sug. on Vend. vol. 1, p. 64; 6 Madd. 10, *cited*.

Where there was an equitable mortgage, with a power of sale, although the mortgagee was precluded from selling the estate for a stipulated period, yet, the mortgagor having become bankrupt within that period, the court made an order for an immediate sale, upon the petition of the mortgagee, against the wish of the assignees. *Ib.*

## Chapter II.

Statutory owners must, of course, sell within such limits (if any) as to time as are prescribed by the act under which they derive their powers; the lands clauses consolidation act, 1845, seems to impose no restrictions as to time upon the purchase of lands by agreement; although it limits the time for compulsory purchases by the company to a period of three years from the passing of the special act, unless some other period be therein prescribed; *(g)* and it would seem that, in the absence of restriction, \*even a compulsory power could be exercised without reference to lapse of time. *(h)* It is sufficient if the company, within the limited period, give notice of their intention to take the lands, and summon a jury to assess their value. *(i)*

[\*29]

Trustees for sale.

Trustees for sale are not, by the usual direction to sell with all convenient speed, precluded from exercising a reasonable discretion as to the time of sale; nor need one co-trustee adopt the opinion of another. *(j)*

Whether bound to sell immediately.

It is laid down that, in the absence of any special direction, trustees for sale, should, subject to a reasonable exercise of discretion, sell with all convenient speed; *(k)* in practice, however, trustees of a will or settlement are not generally considered bound, under the ordinary trust for sale, nor is it usual for them to sell, except upon the request of some one or more of their *cestuis que trust*, or under circumstances which render a sale necessary or expedient; *(l)* or unless the property is not of a permanent character: after a bill is filed for the administration of the

*(g)* L. C. C. Act, 1845, sect. 123.

*(h)* *Thicknesse v. Lancaster Canal Company*, 4 Mee. & W. 472.

*(i)* *Brocklebank v. Whitehaven Junction Railway Company*, 15 Sim. 632; and see *Reg. v. Birmingham and Oxford Junction Railway Company*, 15 L. T. 392.

*(j)* *Buxton v. Buxton*, 1 Myl. & Cr. 80; but see *Taylor v. Tabrum*, 6 Sim. 281. It has been recently held, by the Vice-Chancellor of England, that surviving trustees can make a good title and receive the purchase-money, although the trust instrument directs any vacancy to be filled up within a specified time which has elapsed; *Warburton v. Sandys*, 14 Sim. 622; *sed qu.*

*(k)* Sug. 57.

*(l)* Davidson's Conv. vol. iv. p. 342, n.

trust, trustees cannot sell without leave of the court ;(m) it was, however, held by the Court of Queen's Bench, in a recent case, that the power of an *executor* to make a good title to the chattels real of the testator is not affected by the existence of an administration suit, so long as there is no decree.(n)

\*Trustees of a power of sale, with the usual trusts for reinvestment in real estate, ought not to sell except for some good reason : (o) the court, however, will not control a *bona fide* exercise of their discretion ;(p) but a sale by a trustee, after a *cestui que trust* has become absolutely entitled to the property, is *prima facie* invalid.(q)

[\*30]  
Trustees  
under  
power of  
sale.

When the instrument creating the trust fixes the time for sale, this cannot be anticipated either by the trustees or the court, however ruinous the delay may be to the estate: *e. g.* ; where a testator directed an advowson to be sold *upon the death of A. the incumbent*, the court held that it had no jurisdiction to sell in A.'s lifetime, although upon his death it would be necessary to present a new incumbent before any sale could be effected.(r)

Time fixed  
by author of  
trust, cannot  
be anticipated,  
although  
delay be  
prejudicial.

And, on the other hand, where a settlement of a reversion, in terms authorized a sale at any time with the consent of the tenant for life under such settlement, it was held that the trustees might proceed to an immediate sale, although its effect would be, under the trusts declared of the purchase-money, to vary the rights of the *cestuis que trust* by giving such tenant for life an immediate income.(s)

Reversion  
may be sold  
under trust  
in settle-  
ments, al-  
though  
rights of  
parties are  
thereby  
altered.

Powers of and trusts for sale are often exercisable only under certain specified conditions ; when this is the case,

Conditional  
powers of  
and trusts  
for sale.

(m) *Walker v. Smalwood*, Amb. 676.

(n) *Neeves v. Burrage*, 14 Jur. 177, *sed qu.*

(o) Sug. 62.

(p) 2 Sug. Pow. 470 ; as to the validity of a power of sale, with reference to the rule against perpetuities, see *Wood v. White*, 4 Myl. & Cr. 460 ; *Nelson v. Callow*, 15 Sim. 353 ; and cases cited.

(q) *Jefferson v. Tyrer*, 9 Jur. 1083, V. C. E.

(r) *Johnstone v. Baber*, 8 Beav. 233 ; see *Blacklow v. Laws*, 2 Hare, 40 ; *Gosling v. Carter*, 1 Coll. 652.

(s) *Clark v. Seymour*, 7 Sim. 67 ; and see *Tasker v. Small*, 6 Sim. 625 ; *Blackwood v. Borrowes*, 4 Dru. & War. 441 ; *Giles v. Homes*, 15 Sim. 359.

## Chapter II.

Subsequent  
and prece-  
dent condi-  
tion.

[\*31]

Legal estate.

Difficulty  
where legal  
title depends  
on exercise  
of power  
subject to  
precedent  
condition.

Right of  
tenant for  
life to rents  
of estate  
directed to  
be sold.

As to the  
manner of  
sale.

Power to sell  
by auction,  
does not au-  
thorize sale  
by private  
contract.

and a sale is made in breach of a condition, the purchaser's safety would seem to depend upon the following considerations, viz: 1st, whether the condition is subsequent or precedent; and 2ndly, whether it affects the title to the \*legal estate: if it merely affect the equitable title, an apt declaration in the instrument creating the trust or power will protect the purchaser against the non-performance of a precedent,(t) and, *a fortiori*, of a subsequent condition; as in the case of an ordinary power of sale in a mortgage, which usually contains a precedent condition that certain notices shall have been given, and defaults made in payment; but with a declaration relieving purchasers from liability for a breach of such condition: if, on the other hand, the exercise of a power is to affect the legal estate, as where land is limited in strict settlement, and a power is given to trustees, in certain specified events, to sell, and, for that purpose, to revoke the old and appoint new uses, here, unless the required events occur, the old limitations remain unaffected, notwithstanding any attempted exercise of the power; and any declaration that purchasers shall not be bound to see that the events have happened, would, it is conceived, be inoperative.(u)

A tenant for life, under a will, of the proceeds of sale of estates directed to be sold with all convenient speed, will, from the end of twelve months after the testator's decease, be entitled to the rents of the estates, although they remain unsold.(v)

(2.) *How ought they to sell?*

An agent or trustee, simply authorized to sell by public auction for a given sum, cannot, whatever may be the price offered, sell by private contract.(w)[1]

(t) 2 Sug. Pow. 473.

(u) See, as to the construction of a discretionary trust for sale, *Lord Rendlesham v. Meux*, 14 Sim. 249.

(v) *Vickers v. Scott*, 3 Myl. & K. 500.

(w) *Daniel v. Adams*, Amb. 495; *In re Loft*, 8 Jur. 206, C.; Sug. 56.

[1] Such a sale would not be valid, although the price was greater than was required. Sug. on Vend. vol. 1, 62.

And an express authority to sell by private contract, would not, it is conceived, justify a sale by auction;(x) \*unless the authority were to sell for a given sum, and the price obtained at the auction (after payment of the incidental expenses) exceeded or equalled that amount.

Chapter II.

[\*32]

Whether power to sell by private contract, authorizes sale by auction.

Nor does an authority to sell to A. for a given sum, necessarily justify a sale to B. for that (or, it is conceived, any greater) sum.(y)[1]

Power to sell to A. does not authorize sale to B.

The assignees of a bankrupt may, although they incur a risk in so doing, sell by private contract; and they are justified in selling in lots;(z) we may here remark, that a sale under the general order in bankruptcy should be conducted by the assignees, and not by a mortgagee.(a)

As to mode of sale by Assignees of Bankrupt;

The assignees of an insolvent, under the 1 & 2 Vict. c. 110, (see s. 47,) must, if practicable, sell by public auction, in such manner, and at such place or places as shall be directed by the creditors: if, however, they ineffectually attempt to sell by auction, they can, after the expiration of the time (six lunar months) limited by the act, sell by private contract, with the consent of the major part in value of the creditors present at a meeting duly convened for the purpose:(b) nor is the sale necessarily invalid by reason of the directions of the creditors as to the manner of sale not having been strictly complied with.(c)

or Insolvent;

Mortgagees, trustees, and agents for sale, may, in the absence of restriction, sell by private contract or public auction;(d) they should, however, as a general rule, unless specially authorized to sell by private contract, sell by

or Mortgagees, Trustees, or Agents.

(x) See and consider *Daniel v. Adams*, Amb. 495.

(y) *Bulleel v. Lord Abinger*, 6 Jur. 410, V. C. W.

(z) See Sug. 56.

(a) *Ex parte Cuddon*, 3 Mon. D. & De G. 302; V. C. K. B.

(b) *Mather v. Priestman*, 9 Sim. 352.

(c) *Wright v. Maunder*, 4 Beav. 512.

(d) Sug. 56.

[1] If the testator, by will, directs that after the death of his son, his executors should sell his land, by the advice of A. and B. and A. die in the life of the son, a sale afterwards, by the executors, would not be good, for the assent of A. as well as B. was essential. Cro. Eliz. 26; 1 Leon 286; 3 Ib. 106.

## Chapter II.

●  
Estate may  
be sold in  
parcels.  
[\*33]

But not in  
undivided  
shares;  
semble.

standing  
timber, &c.,  
must be sold  
with the fee.

Sales, and  
proposed al-  
terations in,  
should be du-  
ly advertised

auction, to avoid questions with their beneficiaries, as to whether the price obtained was adequate.

They may also, as a general rule, sell either altogether or in parcels; (e) subject, of course, to a liability to be \*called to account in Equity if they adopt a mode of sale which is clearly depreciatory: but it may be doubted whether, even at law, a power (f) of sale, extending to the entirety of an estate, would be well exercised by a sale of an undivided share: and it has been decided that trustees for sale under a settlement must sell the standing timber with the estate, although the tenant for life be unimpeachable of waste; (g) and that a sale of the estate, apart from the timber, is void at law: (h) the same doctrine would, it is conceived, in ordinary cases, apply to a reservation of minerals, or any other part of the inheritance, upon a sale by fiduciary vendors. (i)

They are also bound to use all reasonable diligence to obtain a fair price: (j) if, therefore, they sell by auction, they should give due notice of and advertise the sale: and, if the estate have been advertised to be sold in one particular manner, (as in lots,) they should not sell in any other way, (as altogether, or under a different plan of allotment,) without re-advertising the sale in accordance with the proposed alterations. (k) [1]

(e) Sug. 56. It would appear that a trust for sale of "any part of" an estate, at the discretion of the trustees, would authorize a sale of the entirety. *Lord Rendlesham v. Meux*, 14 Sim. 249; see *Cooke v. Farrand*, 7 Taunt. 122.

(f) *Chance on Powers*, 2441.

(g) *Cockerell v. Cholmley*, 1 Russ. & M. 418.

(h) *Cholmley v. Paxton*, 3 Bing. 207: see a case of *Silvester v. Bradley*, 13 Sim. 75, where it was, unsuccessfully, contended that the inheritance of the timber was, in equity, severed from the inheritance of the soil; and *Butler v. Borton*, 5 Madd. 40.

(i) But not (it is conceived) to a reservation of *Mines*, on sales to Railway or Waterworks Companies; see 8 Vict. c. 20, s. 77, and 10 Vict. c. 17, s. 18.

(j) 3 Mer. 208.

(k) *Ord v. Noel*, 5 Madd. 438; see p. 441.

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[1] Where the sale by trustees, &c., is made by auction, with all those circumstances of caution which a provident owner would have applied.



A harsh and improvident sale by a mortgagee, will not, however, be set aside in Equity, if clearly within the terms of the power; nor will a mere offer, unaccompanied by actual tender, of the amount due to him, be sufficient to prevent a sale: <sup>(l)</sup> where, as is usually the case, the power is exerciseable only upon notice, a contract for sale is not invalid by reason of its being entered into before the expiration of notice duly given: <sup>(m)</sup> but, where the equity of redemption has been incumbered, and the power does not contain the usual clause making an irregular sale valid as in favor of a purchaser, a sale without the required notice is invalid as against the subsequent incumbrancers, even although the mortgagor expressly waive the notice and consent to the sale. <sup>(n)</sup> [2]

Chapter II.

Oppressive sale by mortgagee not necessarily invalid.

[\*34]

(l) See *Matthie v. Edwards*, on appeal, 11 Jur. 761; and (as *Jones v. Matthie*) 11 Jur. 504, reported below, 2 Coll. 465; and see *Grugeon v. Gerrard*, 4 Y. & C. 119. Money paid for expenses by mortgagor to mortgagee's solicitor, under a threat of an exercise of a power of sale, but not really due, may, it seems, be recovered at law; *Close v. Phipps*, 7 Man. & Gr. 586.

(m) *Major v. Ward*, 5 Ha. 598; which also see, as to mode of giving notice: notice of dissolution of a partnership has been held good, although the party served was a lunatic; and the court said, it would have been good had he been totally blind and deaf; *Robertson v. Lockie*, 10 Jur. 533, V. C. E.; but see other cases there referred to.

(n) *Forster v. Hoggart*, 15 L. T. 134, Q. B.

in the care of his own property, it would form no objection to the specific performance of the contract, that the estate had not obtained a full price. Those who sell by auction, submit themselves to the chance of competition, and must abide by it. Sug. on Vend. vol. 1, p. 63.

[2] "When a foreclosure takes place by a sale of the mortgaged premises, under a power, it is usual, in England, to provide in the mortgage itself for due notice of the sale, so as to afford a fair opportunity of an advantageous sale. If the mortgagee omits to give proper notice, whether directed by the power or not, the sale may be impeached in chancery. In New York, and probably in other states, a sale under a power, is made the subject of a statute provision; but, as the title under such a sale does not affect any mortgagee or judgment creditor whose lien accrued prior to the sale, it must be rather a hazardous and unsatisfactory title, and far inferior to one under a decree in chancery, founded on a view of the rights of all encumbrancers who are brought before the court. The sale under a power, if regularly and fairly made, according to the directions of the statute, is a final and conclusive bar to the equity of redemption. This has been the policy and language of the law of New York, from the time of the first introduction of the statute regulations on the subject, in

## Chapter II.

Sale under  
depreciatory  
conditions,  
improper.

Fiduciary vendors are not, without special authority, justified in selling under any unnecessary and depreciatory special conditions, (such as a condition that the purchaser shall take, at a valuation; fixtures belonging to a third person,) or conditions unnecessarily restrictive of the purchaser's right to a marketable title; it is by no means clear that, under such circumstances, they can make a title which a purchaser can be advised to accept.(o)

Trustees, &c  
employing  
agent, are re-  
sponsible for  
his acts.

Sale with  
consent,  
what consent  
sufficient.

If they employ an agent to sell, or confide the sale to a co-trustee, &c., they will be responsible for his acts.(p)

It seems to be doubtful whether, when a power of sale is exerciseable only with a specified consent, a general prospective consent is sufficient; or whether there must not be a consent to the particular sale; also, whether consent given after the execution of the power is sufficient :(q)  
[\*35] \*we have seen that a consent is not necessarily invalid by reason of its effect being to benefit the consenting party.(r)

(o) 1 Mer. 268; 3 Dav. Conv. 95.

(p) 1 Atk. 87.

(q) See Chance on Powers, 737 to 737; and *Attorney General v. Silrell*, 1 Y. & C. Ex. 559: as to the question whether the consenting power of a tenant for life is affected by the alienation of, or incumbrances on, his life estate, see 5 Jarm. Conv. by Sweet, 161, *et seq.*; *Warburton v. Farn*, 16 Sim. 625; and *Lord Leigh v. Lord Ashburton*, 11 Beav. 470, (where the life estate was subject to judgments,) and cases cited.

(r) *Clark v. Seymour*, 7 Sim. 67, *supra*, p. 30.

March, 1774. *Doolittle v. Lewis*, 7 Johns. Ch. Rep. 50. It was formerly held, that though the mortgagee omitted to record the power, yet that the sale would be binding upon the mortgagor, and bar his equity of redemption. *Wilson v. Troup*, 2 Cowen's Rep. 229, 242. But the revised statutes are too precise to admit of such a latitudinary construction. They declare that, to entitle the party to give notice and to make the foreclosure, it shall be requisite that the power has been duly registered, and that every sale pursuant to a power, as aforesaid, and conducted as therein prescribed, shall be a bar, &c. As proceedings under a power are *in pais*, and no day in court is given to the mortgagor to set up any equitable defence, a court of equity will interfere where payments have been made, and not credited, and stay the proceedings, and regulate the sale as to the extension of notice, or otherwise, as justice may require, and particularly when the rights of the infant heirs of the mortgagor are concerned." 4 Kent's Com. 190, 191. *Van Bergen v. Demarest*, 4 Johns. Ch. Rep. 37; *Nichols v. Wilson*, ib. 115, *cited*.

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(3) *As to the price for which they should sell :—*

They must sell for a gross sum of money, unless any other consideration be specially authorized : for instance, a sale in consideration of a rent charge(s) or annuity is invalid.(t) Statutory owners under the lands clauses consolidation act(u) are expressly restricted to a sale for a gross sum.

As to the consideration, they must sell for gross sum.

They should use all reasonable diligence,(v) as if the estate were their own, to obtain a fair price ; and therefore, of course, should ascertain its value, even at the expense of a valuation, where circumstances seem to render such a course expedient ; if bound to sell by auction, or perhaps, in any case, they cannot safely, without special authority, fix a reserved bidding : (w) but such authority, if possessed, should be exercised ; or, if wanting, should, if practicable, be obtained.[1]

And may have estate valued.

But cannot, safely, without authority fix a reserved bidding ; *semble*.

It has been recently held by Lord *Langdale*, that the assignee of an insolvent, selling by auction at a price below the sum fixed by the creditors for a reserved bidding, could make a good title to a purchaser ; but that he was

Assignee of insolvent selling below reserved price, can make title.

(s) *Read v. Shaw*, 2 Sug. Pow. Appendix.

(t) *Reid v. Shergold*, 10 Ves. 370, 381.

(u) Sect. 10.

(v) Sug. 57.

(w) *Taylor v. Tabrum*, 6 Sim. 281 ; see in *re Hamlet*, 7 Jur. 660 ; where leave was given to assignees in bankruptcy to fix such reserved bidding as the commissioner might approve.

[1] Every trust deed for sale, is upon the implied condition that the trustees will use all reasonable diligence to obtain the best price ; and that, in the execution of the trust, they will pay equal and fair attention to the interests of all persons concerned. If trustees, or those who act by their authority, fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the sale with a view to advance the particular purposes of one party interested in the execution of the trust, at the expense of another party, a court of equity will not enforce the specific performance of the contract, however fair and justifiable the conduct of the purchaser may have been. The remedy of the law is open to such a purchaser, but he has no claim to the assistance of a court of equity. Sug. on Vend. vol. 1, p. 63.

## Chapter II.

[\*36]

Biddings  
may be open-  
ed in bank-  
ruptcy.

answerable to the creditors if the discretion which he had exercised was improper.(x)

\*It appears(y) that the biddings for an estate sold in bankruptcy may be opened before conveyance, upon terms similar to those on which biddings are opened in chancery;(z) and the practice, although disapproved of by Sir *E. Sugden*,(a) has been followed by *V. C. K. Bruce* in a recent case.(b)

Fiduciary  
vendors not  
responsible  
for loss on  
sale by auc-  
tion.

As a general rule, fiduciary vendors, selling by auction, and using all proper precautions to effect an advantageous sale, incur no responsibility should the estate sell below its value; and equity will even help the purchaser to his bargain.(c)

Statutory  
owners can-  
not fix price

Under the Lands Clauses Consolidation Act, statutory owners have no power to fix the price; this must be determined either by a jury, or arbitration, or valuation;(d) it is conceived, however, that a company agreeing with a statutory owner to purchase at a certain price, is bound, if such price be subsequently ascertained, in manner prescribed by the act, to be a fair value for the land.(e)

As to sales  
to railway  
companies,  
&c., by trust-  
ees under  
mere discre-  
tionary pow-  
er; costs of  
re-invest-  
ment.

Where real property is settled in the usual way, with a tenancy for life, and a discretionary power of sale in trustees, and a trust for reinvestment of the purchase-money in land, it may be a question whether the trustees could be advised to exercise the power for the purpose of a sale under the Lands Clauses Consolidation Act, except under a special stipulation that the company shall bear the costs of reinvesting the purchase-money, in the same way as if the sale had been made by the tenant for life under the

(x) *Wright v. Maunder*, 6 Jur. 71; 4 Beav. 512.

(y) *Ex parte Hutchinson*, 2 Mon. & Ay. 727; *Ex parte Partington*, 1 Ball & B. 209.

(z) *Infra*, Ch. XIX.

(a) Sug. 61.

(b) *Ex parte Lee*, 12 Jur. 995.

(c) 5 Madd. 440.

(d) Sect. 9.

(e) See *Frend & Ware's Railway Conv.* 69.

statutory power;(f) or with an increase of purchase-money, as a special compensation for such costs.

\*Municipal Corporations can, under the above act, sell only with the consent of the Treasury.(g)

If the assignee of a bankrupt, being unauthorized by the creditors, buy in the estate, he will, unless they subsequently sanction the step, be deemed a purchaser on his own account :(h) and where the assignees put up the estate in two lots, and bought in both without authority, and, on a resale, there was a loss upon lot A., but a gain upon lot B., they were charged with the loss, and were not allowed to set off the gain.(i)[1]

And trustees for sale, mortgagees, and agents, cannot, without incurring a risk of being held liable for any con-

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[\*37]

Sale by municipal corporations. Assignee buying in estate is liable to be held the purchaser. And cannot set off excess on resale of one lot, against deficiency on re-sale of another.

Trustees, &c., buying in or rescinding contract liable for loss; *semble*.

(f) See Sect. 80.

(g) Sect. 15 of Act.

(h) *Ex parte Lewis, Ex parte Buxton*, 1 Gl. & Jam. 69 & 355: see *Ex parte Cuddon*, 7 Jur. 334; S. C. 3 Mon. D. & De G. 302: and see *Ex parte Tomkins*, Sug. Appendix, No. IX.

(i) *Ex parte Lewis*, 1 Gl. & Jam. 69. The mere putting up a lease to sale by assignees who have not taken possession, without describing it as having belonged to the bankrupt, or as belonging to themselves, will not fix them as assignees of the lease, if not knocked down; *Turner v. Richardson*, 7 East, 335; *sed contra*, if a sale be effected and a deposit paid, although the contract subsequently go off; unless, perhaps, it be clearly shown that it could not have been enforced; *Hastings v. Wilson*, Holt's N. P. Ca. 290. As to the lessor's right to compel assignees of bankrupts or insolvents to elect whether they will accept or decline the lease, see 6 Geo. IV c. 16, s. 75; 12 & 13 Vict. c. 106; s. 145; 1 & 2 Vict. c. 110 s. 50; 7 & 8 Vict. c. 96, s. 12.

[1] An assignee of a bankrupt may buy in an estate, with the previous consent, or subsequent approbation, of the creditors; but if he do so of his own authority, he will be deemed the purchaser, and held to the bargain. Upon a sale under an order in bankruptcy, upon a petition by the mortgagee, the assignees are not allowed to have a mere reserved bidding, and if they buy in the estate, without authority, they will be held to the purchase. If they desire actually to bid for the property, they may have permission, but then the property may be knocked down to them as the real buyers; nor, upon the sale of unincumbered property can the assignees have leave to bid, unless under very special circumstances. Sug. on Vend. vol. 1, p. 65.

Chapter H. sequent loss, buy in the property, or annul a contract for sale without special authority so to do.(j)

(4.) *As to general points relating to sales by fiduciary vendors.*

Fiduciary vendors; their general liability; as to covenants,

[\*38]  
and costs:

As a general rule, fiduciary vendors must show a marketable title, and are in all respects liable to a purchaser as if they were absolute and beneficial owners;(k) except that they ordinarily enter into no covenants for title beside the \*covenant against incumbrances:(l) and their liability extends to costs in a suit for specific performance; they have, however, a general right, except in cases of misbehavior, to recover such costs from the estate of their beneficiaries.

Trustee of legal estate must convey to trustees for sale of equitable estate.

Where an equitable fee is conveyed to trustees for sale, the trustee of the outstanding legal estate must convey it to them without requiring the concurrence of their *cestui que trust*; but if he do more than merely so convey, he will be responsible for any breach of trust which he may thus facilitate.(m)

Sale by trustees, rarely restrained by injunction.

It is only upon strong grounds, and where irreparable injury is likely to be sustained by the parties interested, or a clear breach of trust is about to be committed, that the court will, by injunction, stop an intended sale by fiduciary vendors.(n)[1]

Person assuming to act as trustee, and signing receipt for

We may here remark, that if a person, either rightfully or wrongfully, assume to act as trustee for sale, and in that character sign a receipt for purchase-money, he will

(j) *Taylor v. Tubrum*, 6 Sim 281; *Hill on Trustees*, 492; but see *Sug.* 58.

(k) *Sug.* 61, 63; *McDonald v. Hanson*, 12 Ves. 277.

(l) See *Hill on Trustees*, 269; *Worley v. Frampton*, 5 Hare, 560; *vide infra*, Ch. XII.

(m) *Angier v. Stannard*, 3 Myl. & K. 566, 567.

(n) See *Ex parte Montgomery*, 1 Gl. & J. 338; *Marshall v. Stadden*, 7 Ha. 428.

[1] Sales may be restrained in all cases, where they are inequitable, or may operate as a fraud, upon the rights or interests of third persons. *Hine v. Handy*, 1 John. Ch. Rep. 6.

be answerable for it, whether he himself receive, or allow it to be received by a stranger.(o)

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purchase-money,  
liable.

## \*CHAPTER III.

[\*39]

## AS TO THE RELATIVE DUTIES OF VENDORS AND PURCHASERS PRIOR TO THE SALE.

1. *As to the disclosure or concealment of defects, incumbrances, &c. by the vendor.*
2. *As to commendatory and other similar statements by vendor.*
3. *As to the disclosure or concealment of advantages by purchaser.*
4. *As to depreciatory remarks or conduct by purchaser.*

WE may next advert to some general rules as to the relative duties of intended vendors and purchasers before entering into an agreement for sale: they relate to—

Preliminary negotiations; rules to be observed in.

- 1st. The disclosure or concealment of defects, incumbrances, &c., by a vendor:
- 2ndly. Commendatory and other similar statements by a vendor:
- 3rdly. The disclosure or concealment of advantages by a purchaser:
- 4thly. Depreciatory remarks or conduct by a purchaser.

- (1.) *As to the disclosure or concealment of defects, incumbrances, &c., by a vendor.*

As to disclosure or concealment of defects, incumbrances, &c., by vendor.

Defects in an estate may be either *patent*, that is, such as might be discovered by ordinary vigilance on the part of a purchaser; e. g. the existence of an open footpath over the property;(a) or the ruinous state of buildings;(b)

Vendor need not point out patent defect.

[\*40]

(o) *Rackham v. Siddall*, 1 Mac. & G. 607.

(a) *Oldfield or Bowles v. Round*, 5 Ves. 508.

(b) *Grant v. Munt*, Coop. 177.

## Chapter III.

or *latent*,—that is, such as the greatest attention(c) would not enable him to discover; *e. g.* the existence of defects in a ship's bottom when sold afloat:(d) it is held that a vendor is not bound to point out *patent* defects.(e)[1]

But must not conceal or divert attention from it.

But he must not, either during a treaty for, or while intending, a sale, endeavor to conceal a defect, or to divert a purchaser's attention from it: in neither case, if proved, can he enforce the agreement in equity:(f) and in the first, (as where a vendor, about to sell a house, purposely plastered and papered over a defect in the main wall,)(g) the purchaser may recover his deposit at law; and this, although the estate be sold "with all faults."(h)

Vendor selling by agent and not communicating to him material defect, allowed to enforce contract at law.

But at law, where the plaintiff, knowing that a nuisance existed which rendered his house unfit for a residence, employed an agent to dispose of it, without mentioning to him the nuisance, and the agent, upon being asked by the intended lessee whether there were any objection to the house, replied that there was not; a majority of the court held, that this was no defence to an action for breach of the agreement to take the house;(i) inasmuch

(c) Sug. 383.

(d) See *Mellish v. Motteux*, 1 Pea. Ca. 156.

(e) Sug. 2.

(f) Sug. 2; see *Shirley v. Stratton*, 1 Bro. C. C. 440; *Small v. Atwood*, You. 490.

(g) 4 Taunt. 785.

(h) *Schneider v. Heath*, 3 Camp. 506.

(i) *Cornfoot v. Fowke* 6 Mee. & W. 358; and see *Wilson v. Fuller*, 3 Ad. & E., N. S. (in error) 68; 3 Gale & D. 570.

[1] The vendor is, undoubtedly, morally bound to acquaint the purchaser with the defects of the subject of the contract; though arguments of some force have been advanced in favor of the contrary doctrine. If, however, a person enter into a contract, with full knowledge of all the defects in the estate, the question cannot arise. So if, at the time of the contract, the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults; and cannot claim any compensation for them. Though the disclosure of even *patent* defects in the subject of the contract, may be allowed to be a moral duty, yet it is what the civilians term a duty of imperfect obligation. It is a well settled principle of law, that if the purchaser was, at the time of the contract, ignorant of the defects, and the vendor was acquainted with them; yet if they were *patent* and could have been discovered by a vigilant man, no relief will be granted against the vendor. And in this respect, equity follows the law.



as the plaintiff made no false representation, and the agent, although he made one, did not know it to be false. But, in a suit for specific performance, the decision would doubtless have been in favor of the lessee; and, in fact, a vendor cannot, although the estate be sold subject to all \*faults,(j) rely on the aid of a Court of Equity, if he omit to disclose a *latent* defect which the purchaser has no means of ascertaining.(k)[1]

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But vendor not disclosing *latent* defects cannot enforce specific performance.

[\*41]

As to incumbrances and defects in title:—A vendor must produce to the purchaser all documents of title in his possession(l) or power; and inform him of all material facts not apparent thereon;(m) but he need not direct attention to defects, &c. apparent on the title deeds;(n) or to any matter of which the purchaser has actual or implied notice; for instance, upon the sale of leaseholds(o) the stringent or unusual character of the covenants need not be mentioned; as notice of the lease is notice of its contents; but there must, of course, be no misrepresentation(p) upon the subject, nor any artifice to divert attention.[2]

Must produce deeds, and state all material facts; but need not point out defect in title;

nor matter of which purchaser has notice.

(j) Sug. 2.

(k) See *Lucas v. James*, 7 Ha. 410.

(l) 1 Jarm. C. by S. 63.

(m) Cooper, 312; and see *Gibson v. D'Este*, 2 Y. & C. C. C. 542; Sug. 6.

(n) Sug. 8.

(o) *Hall v. Smith*, 14 Ves. 426; *Pope v. Garland*, 4 Y. & C. 394; *Walter v. Maunde*, 1 Jac. & W. 181; *Smith v. Capron*, 7 Ha. 189.

(p) See the judgment in *Pope v. Garland*, 4 Y. & C. 401, 402, and cases cited.

[1] If a vendor know that there is a *latent* defect in his estate, which the purchaser could not, by any attention whatever, possibly discover, it is not clear, that he is not bound to disclose his knowledge, although the estate be sold subject to all its faults.

[2] See *Tucker v. Woods*, 12 John. Rep. 190; *Judson v. Wass*, 11 John. Rep. 525; *Fuller v. Hubbard*, 6 Con. Rep. 13; *Caswell v. Black River M. Co.*, 14 John. R. 453.

The same rules apply to incumbrances and defects in the title to an estate, as to defects in the estate itself. Both law and equity require the vendor to deliver to the purchaser the instrument by which the incumbrances were created, or on which the defects arise; or to acquaint him with the facts, if they do not appear on the title deeds. If a vendor neglect this, he is guilty of a direct fraud, which the purchaser, however

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Whether it is universally true that notice of lease is notice of all its contents.

What facts are material to title within the above rule. [\*42] Not matters which increase a known risk; *semble*.

Except on purchase of a reversionary interest.

And it may, perhaps, be doubted, whether the above rule as to notice, (general as are the terms in which it is laid down,)(*q*) would, if the question arose in a suit for specific performance, be held to apply so as to affect the purchaser with notice of any matter in a lease which is not in its nature incidental to such an instrument; whether, for instance, such implied notice, although extending to unusual covenants on the sale of the term, would also extend to a clause of pre-emption contained in a lease, upon the sale of the reversion.(*r*)

It is conceived, that upon the purchase of an estate in possession, those facts only are so far *material* as to render \*their disclosure obligatory upon the vendor, which affect his power to give to the purchaser that which he has contracted for; and that, if he buy subject to a known risk, circumstances which increase the amount of risk need not, in general, be stated; for instance, it has been held that the grantor of a personal annuity, or his agents, although bound to give honest answers to all relevant questions put by the intended grantee, need not voluntarily disclose the fact of his being already under large pecuniary liabilities;(*s*) but where the consideration for the annuity is a *reversionary* interest belonging to the purchaser, the grantor is bound, in equity, to communicate to the purchaser the unhealthy state of the proposed *cestui que vie*.(*t*)

(*q*) See Sug. 8.

(*r*) In *Martin v. Cotter*, 3 J. & L. 506, Sugden, C., intimates an opinion that the doctrine as to a lease being notice has been carried too far: and see *Nelthorpe v. Holgate*, 1 Coll. 203; and *Flight v. Barton*, 3 M. & K. 282.

(*s*) *Adamson v. Evitt*, 2 Russ. & M. 72.

(*t*) *Davies v. Cooper*, 5 M. & Cr. 270.

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vigilant, has no means of discovering. If, therefore, a seller knows and conceals a fact material to the title, there is no principle upon which relief can be refused to the purchaser. And it has ever been held that if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser, or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him as well at law as in equity. See Sug. on Vend., vol. 1, p. 5 and 6.

And the mere preparation of an annuity deed by the grantor's solicitor does not place him in any confidential relation towards the grantee, even although no other solicitor be employed in the transaction.(u)

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A solicitor, however, is liable, at law(v) and in equity,(w) who by his misrepresentation induces a person to purchase his client's estate with a defective title.

Vendor's solicitor liable for misrepresentation.

We may, also, in connection with the above head, observe, that a purchaser suspecting that a third person has a claim on the estate, should,(x) in the presence of witnesses (who may take notes of what passes),(y) inquire of him whether such be the fact, and the amount of his claim; at the same time stating his own intention to purchase:(z) and if such person deny the existence of his claim, or assert that it is confined to a specified sum, he will, in equity, be bound by his denial or assertion:(a) \*but, although bound to answer truly, if at all, he may, it would appear, decline to answer, unless the intended purchaser offer to redeem him.(b)

Purchaser should inquire of party supposed to have a claim on the estate.

Supposed claimant bound by his statement or denial.

[\*43]

So, if the interest contracted for be merely equitable, the purchaser should inquire of the trustees whether there are any and what incumbrances; and, on completion, should give them notice of the sale; this is advisable for the sake as well of avoiding litigation with future, as of discovering the existence of present incumbrancers; at the same time, when the purchase is of an equitable estate in land, it appears to be settled that no priority is obtained by inquiry and notice.(c)

Purchaser should inquire of Trustees on purchase of equitable estate, and give notice. But notice does not give priority in case of real estate.

The trustees will be liable in equity if they give false information, either fraudulently or merely through forgetfulness.(d)

Trustees giving false information is liable.

(u) *Adamson v. Evitt*, 2 Russ. & M. 72.

(v) Sug. 6, n.(f)

(w) *Arnot v. Biscoe*, 1 Ves. s. 96.

(x) Sug. 9; *Ibbotson v. Rhodes*, 2 Vern. 554.

(y) *Doe v. Perkins*, 3 Durn. & E. 749.

(z) 2 Vern. 554.

(a) *Pearson v. Morgan*, 2 Bro. C. C. 388; and see 6 Ves. 183, and 3 Ves. & B. 111.

(b) See 2 Y. & C. C. C. 390, *Bugden v. Bignold*.

(c) *Vide infra*.

(d) *Burrowes v. Lock*, 10 Ves. 470.

## Chapter III.

As to commendatory statements by vendor.

Vendor not prejudiced by mere puffing statements.

(2.) *As to commendatory and other similar statements by a vendor.*

It may be laid down as a general rule, that more expressions of praise or affirmations of value, such as, that an estate, sold as a renewable leasehold, is "nearly equal to freehold;"<sup>(e)</sup> or that land, in fact imperfectly watered, is "uncommonly rich water meadow land;"<sup>(f)</sup> that a house of mean character, is "a desirable residence for a family of distinction;"<sup>(g)</sup> will not, however objectionable they may be in point of morality, avoid the contract in Equity.

If amounting to mere expressions of opinion, and not to statement of facts.

[\*44]

And the rule, perhaps, extends to any statement by a vendor, which is, in effect, a mere expression of his own opinion, and does not amount to an assertion of an independent \*and ascertainable fact: such as, a statement, on the sale of an advowson, that an avoidance is "likely to occur soon;"<sup>(h)</sup> or, on the sale of renewable leaseholds, that the fine payable is "small;"<sup>(i)</sup> if a purchaser choose to rely on the vendor's opinion as to what is a small fine, or a probability of speedy avoidance, he does so at his peril.

What misrepresentation will at law avoid the contract, or sustain an action.

And in the strong case of the vendor of an annuity stating that the grantor, (then in prison for debt and insolvent,) "was a man of large property," he was held not liable to an action of deceit at law.<sup>(j)</sup>[1]

(e) *Fenton v. Browne*, 14 Ves. 144.

(f) *Scott v. Hanson*, 1 Sim. 13.

(g) *Magennis v. Fallon*, 2 Moll. 587.

(h) *Trower v. Newcome*, 3 Mer. 704.

(i) *Fenton v. Browne*, 14 Ves. 144.

(j) *Daves v. King*, 1 Stark. 75.

[1] The rule of the civil law was, *simplex commendatio, non obligat*. If the seller merely made use of those expressions which are usual to sellers, who praise at random what they are anxious to sell, the buyer, who ought not to have relied upon such vague expressions, could not, upon this pretext, procure the sale to be dissolved. The same rule prevails in our law. It has even been held that an action could not be maintained against a vendor for having falsely affirmed that a person bid a particular sum for the estate although the person to whom the representation was made, was thereby induced to purchase it, and was deceived in the value. Nor can a purchaser obtain any relief against a vendor, for false affirma-

Where, however, on the sale of a life interest, the particulars described the tenant for life as a very healthy gentleman aged forty-eight, whose life was insurable, and an insurance was guaranteed at five guineas *per cent.*, and it turned out that the vendors had recently insured the life at a rate less than five guineas *per cent.*, but exceeding the rate usually charged on healthy lives, their bill was dismissed with costs, although the purchaser admitted that he knew five guineas to be more than the usual premium.<sup>(k)</sup>

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Mis-statement that a life is a healthy one, not qualified by guarantee that it is insurable at specified rate.

And a false statement, by a vendor, of an independent fact,—as, that the property has been valued by a surveyor at a specified sum,—will, if relied on by the purchaser, <sup>(l)</sup> avoid the contract at law and in equity; <sup>(m)</sup> and might, perhaps, sustain an action at law: but a vendor is not liable to such action for the false assertion that a third person has offered a specified sum for the estate.<sup>(n)</sup>

Valuation of estate by surveyor.

Offer for purchase of estate by third person.

There would seem to be a clear ground of distinction between the two last cases; for a purchaser might naturally consider the opinion of a surveyor to indicate something \*like the market value of the property, although he might attach little importance to the bare offer by an individual, possibly made hastily and soon repented of: though certainly, in the reported case, the purchaser seems to have been directly influenced by the mis-statement.

Difference between the two last cases.

[\*45]

And a false statement that a specified rent is paid for

Purchaser when liable although statement not relied on.

(k) *Brealey v. Collins*, You. 317.

(l) See *Clapham v. Shillito*, 7 Beav. 146.

(m) *Buxton v. Lister*, 3 Atk. 386; *Small v. Althood*, 1 You. 407; Sug. 4; *Lord Brooke v. Rounthwaite*, 5 Hare, 298.

(n) Sug. 3.

tion of value; it being deemed the purchaser's own folly to credit a nude assertion of that nature. Besides, value consists in judgment and estimation, in which men may differ. And in an action, it is not sufficient to show, that the vendor was guilty of a misrepresentation; but it must be shown that some deceit was practised for the purpose of throwing the party off his guard. See *Davis v. Meeker*, 5 Johns. Rep. 354; *Marshall v. Peck*, 1 Dana's Ky. Rep. 611; *Dugan v. Cureton*, 1 Arkansas Rep. 41; *Morrill v. Wallace*, 9 New Hampshire Rep. 111; *Oneida Manu. Co. v. Lawrence*, 4 Cowen's Rep. 440; *Saunders v. Hatterman*, 2 Iredell, N. C. Rep. 32; *Cross v. Peters*, 1 Greenleaf, Maine Rep. 376; *Seymour v. Delancy*, 6 Johns. Ch. Rep. 222.

Chapter III. the premises,(o) has been held to subject the vendor to an action at law, although the purchaser did not rely on his statement, but made inquiries of other persons; who, it is presumed, also deceived him.[1]

Stranger  
when liable  
for mis-state-  
ment.

And the same liability is incurred by a stranger, who even from mere wantonness, intending to deceive, although without any view to gain, makes a false representation to a purchaser as to the value or rent of the property; nor is it material that the sale is by auction instead of private contract;(p) Sir *E. Sugden* says,(q) citing Sir *W. Grant*, "In cases of this nature it will be sufficient to show, 1st, that the fact as represented is false; 2ndly, that the person making the representation had a knowledge of a fact contrary to it."(r) The rule is otherwise laid down by *Mansfield*, C. J., who says, that "it signifies nothing whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false:"(s) the better opinion, however, seems to be, that, in order to sustain an action at law, there must be *actual fraud*; that is, either an assertion, (with or without motive,) of what the party knows to be untrue,(t) or a communication, \*for a deceitful and fraudulent purpose, of that which is in fact untrue, although he may not know it to be so.(u)[1]

There must  
be actual  
fraud;  
semble.

[\*46]

(o) *Lysney v. Selby*, Ld. Raymond, 1118.

(p) *Bardell v. Spinks*, 2 Car. and K. 646.

(q) Sug. 5.

(r) *Burrowes v. Lock*, 10 Ves. 476.

(s) *Schneider v. Heath*, 3 Camp. 506; and see 1 Bro. C. C. 546; 3 Ves. & B. 111, and *Pearson v. Morgan*, 2 Bro. C. C. 388.

(t) See Lord Campbell's judgment in *Wilde v. Gibson*, 1 H. L. C. 633; and cases cited *infra*, n.(u)

(u) See *Foster v. Charles*, 6 Bing. 396; *Polhill v. Walter*, 3 B. & Ad. 114; *Shrewsbury v. Blount*, 2 Man. & Gr. 475; *Freeman v. Cooke*, 6 Dow. & L. 187; *Taylor v. Ashton*, 11 Mee. & W. 401.

[1] It seems that a material misrepresentation of a fact, by *mistake*, and upon which the other party is induced to act, is a ground for relief in equity, equally as if it had been a wilful and false assertion. *M'Ferran v. Taylor*, 3 Cranch. 270; *Rosevelt v. Fullon*, 2 Cowen, 134; *Lewis v. M'Lenore*, 10 Yerger, 206.

[1] This principle was first established in England, in the case of *Par-*

A representation that a man is able to answer an obligation is not binding unless in writing.(v)

(3.) *As to concealment and disclosure of advantages by the purchaser.*

A purchaser need not disclose any fact, unknown to the vendor, which increases the value of the property itself; e. g. the existence of a mine.(w)[2]

But anything, even a mere word, which tends to mislead the vendor upon such a point, will deprive the purchaser of the assistance of a Court of Equity.(x)[3]

Chapter III.

Guarantee of solvency must be in writing.

As to concealment and disclosure of advantages by purchaser.

Purchaser need not disclose concealed advantages.

But cannot sue in equity if he mislead the vendor.

(v) 9 Geo. IV. c. 14, s. 6: see *Haslock v. Fergusson*, 7 Ad. & El. 86.

(w) 2 Bro. C. C. 420; Jac. 178.

(x) Jac. 178.

*ley v. Freeman*, 3 Term Rep. 51, and the doctrine of it, is now well settled both in the English and American jurisprudence. *Upton v. Vail*, 6 Johns. Rep. 181; *Bean v. Herrick*, 3 Fairfield, 262; *Gallagher v. Brunel*, 6 Cowen's Rep. 346; *Benton v. Pratt*, 2 Wendell's Rep. 385; *Allen v. Addington*, 7 Wendell's Rep. 1; S. C. 11 Wendell, 374; *Wise v. Wilcox*, 1 Day's Rep. 22; *Russell v. Clark*, 7 Cranch's Rep. 99; *Hart v. Tallmadge*, 2 Day's Rep. 381; *Patten v. Gurney*, 17 Mass. Rep. 182. The principle is, that fraud, accompanied with damage, is a good cause of action; and the solidity of the principle, says Kent, was felt and acknowledged by the writers on the civil law. (2 Kent's Com. 490.) Misrepresentation, without design, is not sufficient for an action. But if recommendation of a purchaser, as of good credit, to the seller, be made in bad faith, and with knowledge that he was not of good credit, and the seller sustains damage thereby, the person who made the representation, is bound to indemnify the seller. Ib.

[2] There are many duties that belong to the class of imperfect obligations which, though binding in conscience, human laws cannot undertake directly to enforce. It is obvious, that all the material facts ought to be known to both parties, to render the agreement fair, and just in all its parts; and it is against all the principles of equity that one party, knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a specific performance. See *Parker v. Grant*, 1 Johns. Ch. Rep. 630.

[3] In *Turner v. Harvey*, 1 Jacob's Rep. 169, relief was given in equity against a contract, where the purchaser knew that the vendors (who were assignees of a bankrupt) were ignorant of a circumstance considerably increasing the value of the property. And while it was admitted to be the general rule, that the purchaser was not bound to give the vendor information as to the value of the property, yet it was said that very little was sufficient to affect the application of the principle, as if a single word be dropped tending to mislead the vendor. See *Furnam v. Brooks*, 9 Pick. Rep. 212.

Chapter III.

And must disclose fact increasing vendor's interest in the property.

And a purchaser is bound, in equity, to disclose any fact, unknown to the vendor, which increases his *interest* in the property; *e. g.* the actual(*y*) or imminent(*z*) death of a prior life tenant.

As to depreciatory remarks, &c., by purchaser.

Purchaser depreciating the property to intended buyer cannot sue in equity. Whether liable to an action at law.

[\*47]

Slander of title by stranger.

Agreement with, not to bid against at sale permissible.

Effect of written agreement, on preliminary negotiations.

(4.) *As to depreciatory remarks, &c., by the purchaser.*

A purchaser who has misrepresented the property to a third person desirous of purchasing it, cannot enforce the contract in equity.(*a*)

A purchaser, however, is not liable to an action at law for having depreciated the value of the property, or the vendor's chance of sale:(*b*) nor will an action lie against \*a stranger for preventing a sale by giving notice of his claim upon the estate, unless it be shown that such notice was given maliciously:(*c*) and, in any case, in order to support an action for slander of title, the plaintiff must prove falsehood, malice, and special damage.(*d*)

It appears that an agreement between two persons, not to bid against each other at an auction, is not illegal; and forms a good consideration for an agreement giving to the party withdrawing his opposition at the auction a right of pre-emption over other property.(*e*)

It may be remarked that, when a written agreement between the parties has once been entered into, all previous representations become immaterial, except for the purpose of defence in equity,(*f*) or of rebutting a defence, and so maintaining the written contract.

(*y*) *Turner v. Harvey*, Jac. 169; and see *Davies v. Cooper*, 5 Myl. & C. 270.

(*z*) *Ellard v. Lord Llandaff*, 1 Ball & B. 241.

(*a*) *Howard v. Hopkyns*, 2 Atk. 371.

(*b*) *Vernon v. Keys*, 12 East, 632; see p. 638.

(*c*) See Sug. 423, and cases cited.

(*d*) *Brook v. Rawl*, 19 L. J. 114, Exch.

(*e*) *Gallon v. Emuss*, 1 Coll. 243.

(*f*) *Haynes v. Hare*, 1 H. Bl. 664.



## \*CHAPTER IV.

## AS TO THE PARTICULARS AND CONDITIONS OF SALE.

1. *General matters relating to particulars and conditions, and their construction.*
2. *Preparation and contents of particulars.*
3. *As to the conditions.*
4. *As to what special conditions are generally requisite in various specified cases.*
5. *General remarks on special conditions.*

(1.) PARTICULARS and conditions of sale, if intended to exclude the purchaser from what he would otherwise be entitled to, must be expressed in terms the most clear and unambiguous; (a) if there be any chance of reasonable doubt or misapprehension as to their meaning, the construction will be in his favor. (b)

Doubtful particulars and conditions construed strictly against vendor.

It seems, however, that general expressions may not be so read by a purchaser as to make them contravene a well known rule of law, or universal custom, if they be capable of bearing a modified meaning; as where the particulars stated that the fines of a manor about to be sold were arbitrary, it was, in the opinions of Lords *Campbell* and *Brougham*, no misdescription, when it was shown that, (the fines on alienation being arbitrary,) those on the admission of a widow to freebench were certain; inasmuch as such latter fines *never are* arbitrary. (c) [1]

But not so as to contravene rule of law or universal custom.

[\*49]

(a) *Symons v. James*, 1 Y. & C. C. C. 490.

(b) S. C.; *Seaton v. Mapp*, 2 Coll. C. C. 562; *Smith v. Ellis*, 14 Jur. 682.

(c) *White v. Cuddon*, 8 Cl. & F. see pp. 786 and 796.

[1] The court will so construe conditions of sale, as to endeavor to collect the meaning of the parties, without encumbering themselves with the technical meaning of the words. Sugden illustrates this rule as follows: "Where the city of London let an estate by auction for a term of years, according to certain conditions of sale, by which it was stipulated that the purchaser should pay a certain *rent* before the lease was granted, which he accordingly agreed to do, the Court of King's Bench held, that

## Chapter IV.

And may bind purchaser whose attention is directed to their objectionable character.

And even when the conditions are such as would not, under ordinary circumstances, be enforced in equity, a purchaser may be bound, if his attention be drawn to their objectionable nature before he buys; as where, upon a sale under catching conditions as to title, he inquired, "whether a good and marketable title could be made?" and the auctioneer and vendor's solicitor refused to insert any such statement in the conditions, but said that a good title could be made *under the existing conditions*, the purchaser was held to his bargain.(d)

Vendor's undertakings strictly construed.

Any undertaking on the part of the vendor will, it is conceived, as a general rule, be construed strictly in favor of the purchaser; in fact, in a recent case, where, in an agreement for a twenty-one years' lease of a house in Highbury Place, it was stipulated, that there should be a "covenant by lessor for quiet enjoyment by the tenant, and not to let any of the land near Highbury Place, for the purpose of making and burning bricks," it was held, by V. C. *Wigram*, that the lessor must show his title to bind the adjoining land by such a covenant during the proposed term; although it appeared, on the face of the agreement, that the lease was to be granted under a power contained in a will:(e) but this decision was reversed by Lord *Cottenham*.(f)

Cannot be contradicted, explained, or added to, by verbal declarations.

[\*50]

As a general rule, the particulars and conditions cannot be contradicted, explained, or added to, by any verbal declarations at the time of sale;(g) evidence of such declarations is inadmissible at law on behalf of either \*plain-

(d) *Hyde v. Dallaway*, 6 Jur. 119; 4 Beav. 606.

(e) *Darves v. Betts*, 12 Jur. 412.

(f) *S. C.*, 12 Jur. 709.

(g) 1 Jac. & W. 639; Sug. 22; *Higginson v. Clowes*, 15 Ves. 521; and see *Manser v. Back*, 6 Ha. 443.

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although the money to be paid could not be strictly called a rent, the relation of landlord and tenant not having then commenced, yet the parties intended the money should be paid, and it must be paid accordingly. Under an agreement for purchase, with a stipulation that, until the conveyance is made, the purchaser shall pay and allow to the seller, at the rate of a fixed sum per annum, three half-yearly payments will create the relation of landlord and tenant, and the sum payable, will be recoverable as rent." Sug. on Vend. vol. 1, p. 27.

tiff or defendant ;(h) and in equity on behalf of the plaintiff; even although the defendant (the purchaser) have agreed in writing to abide by the conditions and declarations at the sale.(i)[1]

And the same rules apply between the original purchaser at a sale, and his sub-purchaser.(j)[2]

When the auctioneer has, at the sale, made verbal declarations at variance with the particulars, &c., a purchaser would seem to be under this disadvantage, viz., that if the court were clearly satisfied that he heard and understood the effect of the verbal declarations, he probably would not obtain a decree for specific performance *without*

## Chapter IV.

Such declarations inadmissible at law, and [if tendered by plaintiff] in equity.

Rule the same between purchaser and sub-purchaser.

Verbal declarations at sale why prejudicial to purchaser.

(k) *Powell v. Edmunds*, 12 East, 6.

(i) *Higginson v. Clowes*, 15 Ves. 521.

(j) *Shelton v. Livius*, 2 Crompt. & J. 411.

[1] Where estates were put up to sale by auction, and in the printed particulars of sale were stated to be free from all incumbrances, they were bought by a person who, discovering that there was a charge on the estate of £17 per annum, refused to complete the purchase, in consequence of which an action was brought by the vendor; and, although he offered to give in evidence that the auctioneer had publicly declared from his pulpit, in the auction-room, when the estate was put up, that it was charged in the manner above specified, yet the court refused to admit the evidence, as it would open a door to fraud and inconvenience, if an auctioneer were permitted to make verbal declarations in the auction-room, contrary to the printed conditions of sale; and the plaintiff was non-suited. Sug. on Vend. vol. 1, p. 27, 28.

At a sale, the article being ambiguous, the auctioneer declared he was only to sell the land; and, every thing growing upon the land must be paid for. The defendant, the purchaser, insisted he was only to pay for timber and timber-like trees, not for the plantation and underwood. The declaration at the sale was distinctly proved; but, it was determined by the Court of Exchequer that the parol evidence was not admissible. Ib.

It has been held that a purchaser of an estate at auction is bound by the verbal declarations of the auctioneer, publicly made at the sale, and before the biddings commenced, not variant from the terms advertised, but merely additional and explanatory; and that the purchaser may be compelled to complete his purchase according to the terms so explained. *Canon v. Mitchell*, 2 Des. 325; *Wainwright v. Read et al.*, 1 Des. 573.

[2] If A. buy at a sale, after a formal explanation at the sale, which was heard by B., and then re-sell to B., the first declaration is no more binding upon B. than A., and therefore A. cannot enforce the contract, as explained by the auctioneer against B.

## Chapter IV.

Should be reduced into writing.

the variations, supposing them to be to his prejudice ;(k) nor, on the other hand, could he enforce specific performance *with* the variations, supposing them to be in his favor : a purchaser, buying under such circumstances, should have the requisite alterations made in the printed particulars or conditions before the agreement is signed by himself and the vendor : although, in cases where the vendor is selling under a power or trust, this might occasionally give rise to questions with the parties beneficially interested.

Particular information to purchaser, or declarations by auctioneer, may be defence in equity against specific performance.

But any particular personal information given to the purchaser, as to incumbrances, or the title, or even declarations on such points by the auctioneer, may be given in evidence by vendor or purchaser as a defence against a suit for specific performance according to the particulars, &c. ; but do not seem to be admissible on behalf of the plaintiff.(l)[3]

Alteration of printed particulars and agreement signed on unaltered copy.

[\*51]

Where the alteration was made in the printed particulars, and the altered copies were first produced in the \*auction-room on the morning of sale, and the auctioneer, having read and sold by an altered copy, inadvertently signed agreements indorsed on unaltered copies, it was held, that a purchaser could not enforce specific performance according to the particulars as originally published ; although it did not appear that he had heard the auc-

(k) Sug. 23 ; *Ogilvie v. Foljambe*, 3 Mer. 53 ; *Woodward v. Miller*, 2 Coll. 279.

(l) 15 Ves. 23 ; 1 Ves. & B. 524.

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[3] It may be proved that the purchaser perused the original lease before the sale, as that does not contradict the particulars of sale ; but, after such evidence is received, it would be difficult to act upon it, at law, against a direct statement in the particulars that is to bind the purchaser to the knowledge of a fact contrary to the written statement. For the reading the lease at an auction, by the auctioneer, is no excuse for a misdescription of the terms of the lease in the particulars of sale. Such evidence may be used in equity as a defence against the specific performance, if the parol variation was in favor of the defendant, and the plaintiff seek a performance in specie, according to the written agreement. 1 Sug. on Vend. p. 29.

tioneer read the altered copy, or had any knowledge of the alteration.(m) Chapter IV.

If the sale be stated to be made "without reserve," the employment of a bidder to protect the estate,(n) or any private arrangement equivalent to a reserved bidding,(o) will vitiate the sale even in equity; at law there seems to be an inclination to carry the doctrine still further; and where the intention is to reserve a bidding, it is prudent to notice it in the particulars or conditions.(p)[1]

Sale stated to be without reserve, no bidding allowable on behalf of vendor.

(2.) *As to the preparation and contents of the particulars.* Particulars.

The particulars should fairly and accurately describe the estate; if, although grammatically correct, they are so obscure as to be likely to deceive an ordinary purchaser, the sale will be liable to be set aside.(q)[2]

Description of property in, to be fair and clear.

(m) *Manser v. Back*, 6 Ha. 443.

(n) *Meadows v. Tanner*, 5 Madd. 34.

(o) *Robinson v. Wall*, 10 Beav. 61; 2 Ph. 372.

(p) See *Thornett v. Haines*, 15 Mees. & W. 371, 372.

(q) *Taylor v. Martindale*, 1 Y. & C. C. 658; *Symons v. James*, ib. 490; *Martin v. Cotter*, 3 J. & Lat. 496.

[1] If the particulars or advertisements state that the estate is to be sold, *without reserve*, it is clear the sale would be void against a purchaser, if any person were employed as a puffer, and bid at the sale. The plain meaning of the words *without reserve*, in a particular of sale is, that no person will be employed to bid, on behalf of the vendor, to keep up the price; and the vendor could have no claim to the aid of a court of equity to enforce a contract against the purchaser, into which he might have been drawn by the vendor's want of faith.

[2] If the description be substantially true, and be defective, or inaccurate, in a slight degree only, the purchaser will be required to perform the contract, if the sale be fair, and the title good. Some care and diligence must be exacted of the purchaser. If every nice and critical objection be admissible, and sufficient to defeat the sale, it would greatly impair the efficacy and value of public judicial sales; and therefore, if the purchaser gets substantially the thing for which he bargained, he may generally be held to abide by the purchase, with the allowance of some deduction from the price, by way of compensation for any small deficiency in the value, by reason of the variation. See 2 Kent Com. 437; *King v. Bardeau*, 6 Johns. Rep. 38.

The estate cannot be too minutely described in the particulars; for, although it is impossible that all the particulars relative to the quantity, the situation, &c., should be so specifically laid down, as not to call for some allowance when the bargain comes to be executed; yet, if a person,

## Chapter IV.

Agreement  
to sell land,  
what it in-  
cludes.

All legal in-  
cidents are  
presumed to  
accompany  
the property.

[\*52]

An agreement to sell land, is, in the absence of any restrictive expressions, an agreement to sell the whole of the vendor's interest therein ;(r) and such interest, if not described, will be inferred to be an estate in fee simple ;(s) and, unless the contrary be expressed, the interest offered for sale, (whether it be absolute or qualified,) will be presumed \*to be accompanied by all those advantages which are legally incidental to it. Therefore, an infringement of the rule, *Cujus est solum ejus est usque ad cælum*, is, (if not mentioned in the particulars,) sufficient to avoid the contract as against the purchaser.(t)[1]

(r) *Bower v. Cooper*, 2 Ha. 408.

(s) Sug. 339; *Hughes v. Parker*, 8 Mees. & W. 244; and see, *Cattel v. Corral*, 4 Y. & C. 228, 236.

(t) *Pope v. Garland*, 4 Y. & C. 403.

however little conversant with the actual situation of his estate, will give a description, he must be bound by that, whether conversant of it or not. See *Judson v. Wass*, 11 Johns. Rep. 525; *M'Farra v. Taylor et al.*, 3 Cranch, 70; *State v. Gaillard et al.*, 2 Bay, 11.

[1] The conveyance of a whole carries all its parts, as well at law, as in equity, though some of them were not in the view of the parties. *Farnam v. Brooks*, 9 Pick. Rep. 212. And a deed of *all one's share and interest*, passes reversionary as well as present estates. *Sowle v. Sowle*, 10 Pick. Rep. 376. It is said the description of the property cannot be too minute and accurate. And if the description is wrong, it will control even the acts of the grantee in taking possession of the estate. Hence, where a grantee is evicted from lands taken possession of under his deed, but not falling within the description in the deed, he cannot recover, on the covenants of seisin, and for quiet enjoyment. 10 Gill & John. 7; 14 Wend. 671.

In the description of real property, there are, in common use, certain technical terms. The word *messuage* is synonymous with dwelling-house. The conveyance of a dwelling-house will pass a shed and chaise house, so connected with it as to make one building. *Hilton v. Gilman*, 5 Shepl. 263. And, if granted *with the appurtenances*, includes all buildings attached to, or connected with the house, the cartilage, garden and orchard, and the close in which the house stands. But not any greater quantity of land, though usually occupied with the house. *Land* includes any species of soil, and all buildings erected on it. The word *farm* embraces a messuage, and all the kinds of lands used therewith. *Homestead farm* does not necessarily include all the parcels of land owned by the grantor, though lying and occupied together, and though a part of them are conveyed. *Woodman v. Lane*, 7 N. H. Rep. 241; *Jackson v. Berringer*, 15 Johns. Rep. 471. A grant of *woods*, passes the land or an exclusive right, so far as is necessary for the support of the trees. *Clap v. Draper*, 5 Mass. Rep. 268.

But an agreement to sell land to a railway(*u*) or water-works company, (*v*) if subject to the provisions of the late consolidation acts, does not include the minerals, unless they are expressly comprised in the purchase.

Chapter IV.

Minerals, unless named, not included in sale to railway or waterworks company.

So, any charge upon the estate, or right restrictive of the purchaser's absolute enjoyment of it, and the release of which cannot be procured by the vendors, should be stated; or the omission may, in many cases, avoid the sale as against the purchaser; (*w*) *e. g.*, a right of sporting over the estate, (*x*) a right of common every third year, (*y*) a right to dig for mines, (*z*) a liability to repair the church chancel, (*a*) or (it is conceived) a liability to heriots, or any other right or liability which cannot fairly admit of compensation, would, if undisclosed, have that effect.

Particulars or conditions must notice permanent charges, or rights restrictive of absolute enjoyment of property.

Rights of way (if any) should be referred to; for although a mere non-disclosure of their existence, might not, in general, avoid the contract, (*b*) the court would readily lay hold of anything in the particulars, &c. at all inconsistent with their existence, as a ground for relieving a purchaser.

Rights of way.

So, if the vendor's interest be in any way determinable, the fact should appear; for when a redeemable annuity was offered for sale, simply as an annuity, (*c*) and lease-

And anything which may determine vendor's interest.

(*u*) 8 Vict. c. 20, s. 77.

(*v*) 10 Vict. c. 17, s. 18.

(*w*) Sug. 352, 353.

(*x*) *Burnell v. Brown*, 1 Jac. & W. 172.

(*y*) *Gibson v. Spurrier*, Peake's Ad. Ca. 50.

(*z*) *Seaman v. Vawdrey*, 16 Ves. 390.

(*a*) *Forteblow v. Shirley*, 2 Sw. 223.

(*b*) *Oldfield or Bowles v. Round*, 5 Ves. 508.

(*c*) *Coverley v. Burrell*, Sug. 29.

*Pastures* include pasturage land of the grantor, and also his pastures and feedings in the land of others. The term *meadows* passes meadow land. *Jackson v. Halstead*, 5 Cow. Rep. 216. The term *water* merely passes the fishery. To convey the water itself the description should be, so much land covered with water. The grant of a river does not pass the soil, nor an island within it. But land under water passes as land within the bounds mentioned. 5 Cow. Rep. 216; 1 Wend. 237. The word *tenement*, though popularly applied only to buildings, includes, in law, everything of a permanent nature, which is capable of being holden, whether corporeal, or incorporeal. 2 Hilliard on Real Prop. 337, 338, 339.

Chapter IV. hold houses were sold, without any mention being \*made of a *private* act of parliament which gave a company the right to purchase them, (d) the sales were held invalid.

But not matter of which purchaser has notice; e. g., stringent covenants on sale of leaseholds. The vendor, however, is not bound to mention in the particulars any matter affecting the property, and of which the purchaser has notice: e. g., on the sale of leaseholds, the fact that the covenants and restrictions in the lease are unusually stringent, need not be stated: for the purchaser, having notice of the lease, should satisfy himself as to the contents before he buys. (e)

Or fines or customs on sale of copyholds. So, on the sale of copyholds, the particulars need not refer to the fines or customs of the manor; these being generally incidental to copyhold tenure. (f)

Or quit rents, &c., on sale of manorial freehold. So, where, on the sale of freeholds, it distinctly appears by the particulars that the land is held of a manor, it is conceived, that the vendor need not refer to the existence of quit rents, or even heriots; (g) the fair and proper

Or statutory local taxes. course, however, would be to mention the fact: so, where land is sold as fen land, the particulars need not refer to Embanking and Drainage taxes, to which it is subject under a local but public act of Parliament. (h)

Or notorious local customs. So, on the sale of lands within the mining districts, any reference to the rights of mining, (i) under the local customs, would, it is conceived, be unnecessary; as their existence is matter of notoriety.

But there must be no misrepresentation; e. g., misstatement of terms of lease, although read at sale. But the particulars must contain no misrepresentation; e. g., if, on the sale of leaseholds, the terms of the lease are misstated, the sale may be set aside; even although the auctioneer read the lease at the sale. (j)

\*So, where the property thirty-three feet in depth was described as forty-six feet deep, the purchaser was al-

(d) *Ballard v. Way*, 1 Mee. & W. 520.

(e) *Hall v. Smith*, 14 Ves. 426; *Pope v. Garland*, 4 Y. & C. 394; *Pater-son v. Long*, 6 Beav. 590.

(f) See and consider, *White v. Cuddon*, 8 Cl. & Fin. 766.

(g) See *Damerell v. Protheroe*, 10 Q. B. 20; showing that heriots may be due in respect of freeholds.

(h) *Barraud v. Archer*, 2 Sim. 433; affirmed, 2 Russ. & Myl. 751.

(i) As to which see *Rogers v. Brenton*, 12 Jur. 263.

(j) *Flight v. Booth*, 1 Bing. N. C. 369; *Jones v. Edney*, 3 Camp. 285, and see *Van v. Corpe*, 3 Myl. & C. 269; *Flight v. Barton*, ib. 282.



lowed an abatement, although he was the occupying tenant.<sup>(k)</sup>

And the effect of what would otherwise be notice may be destroyed, not only by actual misdescription or misstatement, but by anything calculated to deceive, or even lull suspicion, upon the particular point; as where lot A. (building land,) was expressed to be sold subject to the rights of way reserved by the existing leases of adjoining property B., and a plan, specially referred to in the particulars, disclosed a carriage way reserved over A. to B., and also a way reserved over A. to another lot C., but gave no indication of *another* way reserved over A. to B., the particulars and plan were treated as deceptive, and the purchaser was not held bound, under the particular circumstances, to have inspected the leases.<sup>(l)</sup>[1]

So, where a lessee sold, (by way of underlease,) part of a demised estate, and the particulars mentioned that the original lease contained a power of re-entry on breach of a covenant against certain trades being carried on upon the premises, and that the purchasers must enter into similar covenants, but did not state the fact that some underleases, already granted of parts of the property, contained no such covenants, the purchaser recovered his deposit at law.<sup>(m)</sup>

Where a lease, which contains the usual covenant to deliver up the premises in good repair at the end of the

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sions of property, although in occupation of purchaser.

Nor anything calculated to deceive, or lull suspicion.

Reference to deceptive plan.

Or deceptive statements as to liability under covenants in lease.

On sale of lease, removal of buildings which

(k) *King v. Wilson*, 6 Beav. 124.

(l) *Dykes v. Blake*, 4 Bing. N. C. 463; and see *Gibson v. D'Este*, 2 Y. & C. C. C. 542.

(m) *Waring v. Hoggart*, Ry. & Moo. 39; and see *Darves v. Bells*, 12 Jur. 412, 709,

[1] The misrepresentation may be as well by deeds, or acts, as by words; by artifices to mislead as well as by positive assertions. 1 Story's Eq. Juris. sec. 192. Whether the party misrepresenting a fact, knew it to be false, or made the assertion without knowing; or even if the party innocently misrepresents a fact by mistake, the effect is the same. The misrepresentation, however, must be of something material, constituting an inducement, or motive to the act, or omission of the other party, and by which, he is actually misled to his injury; and it must also be, in something, in regard to which, the one party places a known confidence in the other.

## Chapter IV.

lessee must deliver up at end of term, must be stated.

[\*55]

As to puffing statements in particulars.

Reference to erroneous plan.

To an accurate plan, is merely tantamount to view of estate.

To plan showing intended adjacent improvements.

Effect of statement that adjoining land is building land.

[\*56]

term, is sold, and any of the demised buildings have been removed, the fact should be stated: the omission of the buildings from the particulars is not sufficient.(n)

\*As respects commendatory statements and descriptions in the particulars, we may refer to the observations already made in Ch. III.: a fair and correct description will, in the average, be found to be as agreeable with sound policy as it is with morality.

When a plan of the estate is attached to, or accompanies, the particulars, and is incorrect, it will be a material consideration with a Court of Equity whether the purchaser was thereby misled: but, if accurate, it is merely tantamount to a view of the property; so that when an estate was sold in lots, and it correctly appeared by the plan that lot 1, an Inn, was supplied with water by a drain leading from a well in lot 4, this was held not to amount to any engagement on the part of the vendor that there should be any reservation of a right to water in the conveyance of lot 4: and a bill filed by the purchaser of lot 1 for compensation, was dismissed with costs.(o)

So, on the sale or lease of building ground, the exhibition, on the plan, of intended improvements on the adjacent land, does not bind the vendor or lessor to execute such improvements:(p) although it appears that a vendor would not be allowed to divide and appropriate the land in a different manner, so as to attract an occupancy and population entirely different from that which would probably have been produced by acting on the plan proposed and held out at the sale:(q) nor, on the other hand, when a house is sold "with all its lights," does a statement in the particulars that adjoining land is building-land, authorize the vendor, or a purchaser of the adjoining land, to build thereupon, so as to obstruct such lights.(r)

\*And it may be here remarked, that it is well establish-

(n) *Granger v. Worms*, 4 Camp. 83.

(o) *Fewster v. Turner*, 6 Jur. 144; and see *Dykes v. Blake*, 4 Bing. N. C. 463.

(p) *Feloffs of Heriot's Hospital v. Gibson*, 2 Dow. 301; *Squire v. Campbell*, 1 Myl. & Cr. 459; see *Schreiber v. Creed*, 10 Sim. 9.

(q) *Placock v. Penson*, 11 Beav. 355.

(r) *Swansborough v. Coventry*, 9 Bing. 305.

ed that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be *new*, he cannot, nor can any one who claims under him, build upon the adjoining land so as to obstruct or interrupt the enjoyment of those lights.(s)

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Vendor of house retaining adjoining land cannot obstruct lights.

In the construction of particulars of sale, the courts have attached the following meanings to the following expressions ; viz.,

By the description of a house as "brick-built," is understood brick-built in the ordinary sense of the word ; not composed externally partly of brick, and partly of timber and lath and plaster :(t)

"Brick-built house ;"

By "clear yearly rent," is understood a rent clear of all outgoings, &c. usually borne by the tenant ; but subject to such (as land tax) as are borne by the landlord :(u)

"Clear yearly rent ;"

The expression "farm," includes woodland, part of the estate, although not in the occupation of the tenant :(v)

"Farm ;"

The expression "free public house," is a misdescription when the lease contains a covenant to take beer from the lessor :(w)

"Free public house ;"

By the expression "ground rent," if unexplained, is to be understood a rent less than the rack rent of the premises : its proper meaning is the rent at which land is let for the purpose of improvement by building (x)

"Ground rent ;"

### \*(3.) As to the conditions.

[\*57]

In the absence of stipulation, a bidder at an auction may, audibly, before the fall of the hammer, retract his bidding (y) ; [1] a condition negating this right is almost

Conditions. Against retracting biddings.

(s) *Per Curiam*, 9 Bing. 309.

(t) *Powell v. Double*, Sug. 30.

(u) 2 Ves. sen. 500.

(v) *Portman v. Mill*, 3 Jur. 356.

(w) *Jones v. Edney*, 3 Camp. 285.

(x) *Stewart v. Alliston*, 1 Mer. 26.

(y) *Payne v. Cave*, 3 Durn. & E. 148.

[1] Every bidding is nothing more than an offer on one side, which is not binding on either side, until it is assented to, and that assent signified on

## Chapter IV.

Whether or  
no bidding.For reserved  
bidding, how  
far neces-  
sary.

always inserted, and is recommended by Sir E. Sugden, who nevertheless expresses his opinion that it cannot be enforced (z): such a condition, however, was recently held to bind a mortgagee's solicitor, who bid at a sale of the mortgaged property made by the court with the mortgagee's concurrence.(a)[2]

On sales by auction, a reserved bidding, if desired, should be provided for by the conditions: it does not, however, appear that the employment of a bidder merely to protect the estate from a sale at an undervalue, will, in equity, avoid the sale, unless it be stated to be without reserve.(b)[3]

(z) Sug. 20.

(a) *Freer v. Rimner*, 14 Sim. 391.

(b) Sug. 16; *Woodward v. Miller*, 2 Coll. 279; *vide infra*, Ch. V. and *supra*, p. 51.

the part of the seller, by knocking down the hammer. It is in the nature of a contract, and the assent of both parties is necessary to make it binding. If a bidding were binding on the bidder before the hammer was down, he would be bound by his offer and the vendor would not.

[2] "This condition," says Sugden, "was originally suggested to me by the case of *Payne v. Cave*, and it has now become a common condition. But I always thought it one that could not be enforced." 1 Sug. on Vend. 26.

[3] It seems that the employment of a bidder, by the owner, would or would not be a fraud, according to circumstances tending to show innocence of intention or a fraudulent design. If he was employed *bona fide*, to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate the sale. But if a number of bidders were employed by the owner to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner, to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale. 2 Kent Com. 539; *Hazel v. Dunham*, N. Y. Mayor's Court, July, 1819; *Morehead v. Hunt*, 1 Badg. & Dev. Eq. Rep. N. C. 35; *Woods v. Hall*, ib. 411; *Wolfe v. Luyster*, 1 Hall's N. Y. Rep. 144; *Smith v. Greenlee*, 2 Dev. N. C. Rep. 126; *Phippen v. Stickney*, 3 Metcalf, 384.

"The authorities," says Sugden, "preponderate in favor of the validity of a person privately bidding, and the practice is universally adopted, and ought not to be lightly disturbed." Where public notice has been given, the contract will be binding on the purchaser, although there was no contest between real bidders; but only the purchaser and the person employed to bid, bid against each other. And the rule would seem to be the same, even where public notice had not been given, provided the bidder was appointed only to protect the vendor's interest. But where a person is em-

On a sale by auction, it is usual to require, by the conditions, payment of a deposit by the purchasers; and, in many cases, this may be a prudent precaution on a sale by private contract: if the deposit will amount to a large sum, it may be well to provide for its investment, (exchequer bills are usually selected,) in order that there may be no loss of interest, nor liability from the depreciation of securities.

Chapter IV.

As to payment and investment of deposit.

It is also the ordinary practice to insert a condition that the vendor shall, within a specified time, at his own expense, make and deliver to every purchaser an abstract of the title to the lot or lots purchased by him; but the vendor is, independently of any condition, bound to deliver an abstract; a delivery of the title deeds is not \*sufficient: (c) the condition, however, is useful as fixing the time for delivery.

For delivery of abstract.

[\*59]

When the lots are small, and the title is voluminous, it may be well to provide, that no purchaser whose aggregate purchase-money shall not amount to a specified sum shall be entitled to an abstract, (or an abstract going beyond a certain date,) except at his own expense: in such a case it may be well to stipulate that a full abstract shall be deposited with the vendor's solicitor, or elsewhere, for inspection by purchasers.

Restrictive of purchaser's right to abstract, when expedient.

If any other condition refer to "the delivery of the abstract," this, in any question as to time, will be held to

"Abstract," in conditions as to time, means "perfect abstract."

(c) Sug. 431; *Horne v. Wingfield*, 3 Scott, N. R. 340.

ployed, not for the defensive precaution, with a view to prevent a sale at an under value, but to take advantage of the eagerness of bidders to screw up the price, that will be deemed a fraud. Neither do the cases authorize the vendor to appoint more than one person on his behalf. Though proper that a vendor should appoint a person to guard his interests against the intrigues of bidders, it does not follow that he may appoint more than one. Such a proceeding would be fraudulent. It would be simply a mock auction. See Sug. on Vend., vol. 1, p. 22.

In South Carolina, in the case of *Jenkins v. Hogg*, 2 Const. Rep. 821, it was held that the employing a person to bid on the part of the vendors, at a public sale, is not illegal; and that a purchaser at such sale will be compelled to complete his purchase, although he had no notice that such person was so employed, and the price by such means was carried much beyond the real value.

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mean the delivery of a *perfect abstract*:(d) *i. e.*, an abstract as perfect as the vendor could furnish at the time of delivery.(e)

Effect of non-delivery of, on conditions as to time.

If the vendor fail to deliver a perfect abstract within the time specified, the purchaser is relieved from any condition binding him to object to the title within a given period from delivery of the abstract:(f) it is not unusual to guard against this rule, by providing, (in the condition as to objections,) that "an abstract shall, as regards any objection or requisition, be considered perfect, if it supply the information suggesting the same, although it may be otherwise defective."(g)

Condition for time of completion, and as to interest.

It is usual, and proper, in every case, to specify in the conditions the day on which the purchase is to be completed, and from which day the purchaser is to have possession of the estate, or (if it be in lease) receipt of the rents and profits, and to pay interest upon the purchase-money if not then paid; and up to which day the vendor is to pay the outgoings. This condition, as to time, will

[\*59]

\*not, however, in ordinary cases, be binding in equity, unless time be declared to be of the essence of the contract.(h)

Should provide for payment of interest in all events.

It is generally thought best to provide that the arrangement as to payment of interest and receipt of the profits, &c., shall hold, whatever may be the cause of delay in completion: and it was, until recently, the general

Effect of the condition.

opinion, that the purchaser must, under such a condition, pay interest during the time spent in clearing up the title:(i) although, of course, it would not justify the vendor in wilful delay:(j) but, where the expression was, "if from any cause whatever the purchase-money shall not be paid on, &c., the purchaser *making default* shall pay interest," &c., it was decided, that the purchaser was exempted from payment of interest when the delay arose

(d) *Hobson v. Bell*, 2 Beav. 17.

(e) *Morley v. Cook*, 2 Ha. 111.

(f) *Blacklow v. Laws*, 2 Ha. 40; *Southby v. Hutt*, 2 Myl. & Cr. 211.

(g) And see also *infra*, Ch. VIII.

(h) *Vide infra*, Ch. X.

(i) See *Greenwood v. Churchill*, 8 Beav. 413; *Esdaile v. Stephenson*, 1 Sim. & St. 122.

(j) *S. C.*; see the judgment in *De Visse v. De Visse*, 1 Mac. & G. 336.

from the state of the title ; inasmuch as he had made *no default* :<sup>(k)</sup> in a modern case, at law, where the agreement was that the purchaser should pay interest from the day fixed for completion, if completion "should be delayed on his part," and the vendor and his trustee were ready to complete on the day named, but the purchaser was not prepared, and afterwards, when the purchaser was ready, the vendor's trustee refused to concur, it was held that interest was not payable after the latter date :<sup>(l)</sup> in a recent important case,<sup>(m)</sup> where the purchase was to be completed and the money paid on a certain day, "but, if the purchaser should fail in making such payment, then, from whatever cause the delay might have arisen," interest was to be paid at five *per cent.* ; and considerable delay arose in making out the title, it was held, either that the purchaser "was not bound to pay interest until a good title was shown, or that, if bound by the condition to such payment, he was entitled to an equivalent compensation from the vendor : probably a condition that "if, from any cause whatever, other than the wilful and capricious refusal of the vendor to make out his title or to convey his estate, the purchase shall not be completed on the specified day, the purchaser shall thenceforth pay interest on so much of his purchase-money as for the time being shall remain unpaid, and shall have no claim to compensation in respect of the delay in completion," might escape the rule laid down in *De Visme v. De Visme*.

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*De Visme v. De Visme.*

[\*60]

We may here remark that an agreement that if the purchase-money is not paid at the time fixed for completion, the purchaser shall pay "in lieu of interest upon the same a clear rent of — *l. per annum*," is not usurious by

Condition for payment of rent in lieu of interest, not usurious.

(k) *Denning v. Henderson*, 1 De G. & S. 689 ; 12 Jur. 89.

(l) *Perry v. Smith*, 1 Car. & M. 554.

(m) *De Visme v. De Visme*, 1 Mac. & G. 336 ; *vide infra*, Ch. XIII. as to payment of interest.

## Chapter IV.

For preparation and execution of conveyance.

reason of the rent exceeding the amount of interest at 5*l.* per cent. on the purchase-money.(n)[1]

It is usual upon a sale by auction, to provide, that the vendor shall, upon payment of the purchase-money, execute proper conveyances to the respective purchasers, of the lots purchased by them respectively; such conveyances, &c., to be prepared by and at the expense of the respective purchasers, and by them tendered for execu-

(n) *Spurrier v. Mayoss*, 1 Ves. jun. 527.

[1] As a general rule, where the transaction is substantially a loan, upon an understanding that the money or thing lent is to be returned, at all events, the lender cannot lawfully reserve or take to himself anything in the shape of interest or profit, beyond the amount of interest at the legal rate; and no shift or contrivance for this purpose, will be allowed to take the case out of the statute. Frequent instances of what are deemed shifts or contrivances to elude the statute, are where the loan is made in a depreciated currency, or in bonds, notes, or goods of a less value than their nominal amount; or, where the advance of money, although exhibiting all the characteristics of a loan, is made to assume the form of a purchase of a rent charge, or an annuity, payable out of lands, and exceeding lawful interest, on the sum advanced. And, where the borrowing of money is accompanied by the grant of a lease, by the borrower to the lender, the latter taking advantage of the necessities of the former, to obtain a lease at rent less than the fair yearly value of the lands, or upon more advantageous terms than he otherwise could have done, at the same time reserving to himself full interest upon the money lent. The true question seems to be, whether the substance of the transaction was really the loan of money, or the creation of a debt, whatever may be the form of the contract; and, if found to be so, then, whether the lender or payee stipulated for, or secured to himself, by means of the loan, and arising either from it, or from anything connected with it, and forming a part of the same transaction, any profit or pecuniary advantage he would not otherwise have been entitled to, exceeding the rate of interest allowed by law. A profit made, or loss imposed, on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, has always been adjudged to be so much profit taken upon a loan, and to be a violation of those laws which limit the lender to a specified rate of interest. And also where, in connection with the loan of money, and a part of the transaction, the lender sells to the borrower, while in embarrassed circumstances, bonds, goods, or other things, at a price exceeding their real value, and includes the amount in the security for the loan. See *Dowdall v. Lenox*, 2 Edw. Ch. Rep. 267; *Nourse v. Prime*, 7 Johns. Ch. Rep. 69; *Bank of the United States v. Owens*, 2 Pet. Rep. 527; *Lloyd v. Scott*, 4 Pet. Rep. 205; *Eagleson v. Shotwell*, 1 John. Ch. Rep. 535; *Morgan v. Schermerhorn*, 1 Paige Ch. Rep. 544.



tion at a specified time and place : the condition is scarcely necessary ; for the contract in itself gives the purchaser a right to a conveyance upon payment of his purchase-money ; and he is, *prima facie*, bound at his own expense to prepare and tender it.<sup>(o)</sup> Chapter IV.

If, where property is sold in lots, any part comprised in two or more lots be upon lease at one entire rent, or if all or any part of the property comprised in one lot, be let together with other property at one entire rent, the conditions \*must provide for its apportionment ; and, although not strictly necessary, it may, by way of precaution, be well to provide, that the concurrence of the tenant shall not be required.<sup>(p)</sup> For apportionment of rent, on sale of reversion.  
[\*61]

Upon the sale of land used for agricultural purposes, it may be often necessary to insert a condition as to the growing crops being taken and paid for by the purchaser. As to crops, &c.

If the property be in lease at the time of sale, the purchaser will, of course, be subject, in this respect, to the rights of the tenants : if, however, it be in hand, and nothing be said as to the crops, they will belong to him from the day fixed for completion : and, it is conceived that the vendor will not be at liberty previously to remove them in an immature state. Right to, if no condition.

There should be a condition as to fixtures, if the purchaser is to pay for any ; common fixtures would probably be held to be included in a contract for sale, and would pass by the conveyance, unless a contrary intention could be collected from the instrument.<sup>(q)</sup>[1] As to fixtures

(o) Sug. 263 ; *Poole v. Hill*, 6 Mee. & W. 835.

(p) 3 Dav. Conv. 73.

(q) Sug. 37, and cases cited.

[1] In New York, things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed into the wall of a house, so as to be essential to its support, go to the executor as assets ; and, all other things annexed to the freehold, descend to the heir or devisee. 2 N. Y. Rev. Stat. p. 83, secs. 6, 7, 8.

The strict rule as to fixtures that applies between heir and executor, applies equally between vendor and vendee, and mortgagor and mortgagee ; and growing crops, manure lying upon the land, and fixtures erected by the vendor for the purpose of trade and manufactures, or potash

## Chapter IV.

As to payment for timber.

Payment for timber by the purchaser, if intended, must be provided for by the conditions.(r)[2]

(r) Sug. 36; see *Higginson v. Clowes*, 15 Ves. 516.

kettles for manufacturing ashes, pass to the vendee of land. 2 Kent Com. 346. So a kettle in a fulling-mill, set in brick work, and used for dying cloths, will pass to the mortgagee in fee of the mill; though no mention of the appurtenances be made in the deed. *Union Bank v. Emerson*, 15 Mass. Rep. 159. But in *M'Clintock v. Graham*, 3 M'Cord Rep. 553, where the question was in respect to a still and vessels set up in a rock furnace which was built against the wall, it was held they did not pass by the contract of sale.

When a farm is sold without any reservation, the rule is, that whatever is affixed to the freehold, becomes part of it, and cannot be removed. The vendor has the absolute control, not only of the land, but of the improvements; and he has an election to sell, or not to sell. If he does sell, he knows the fixtures pass, not being, in such cases, personal property. *Holmes v. Tremper*, 20 Johns. Rep. 29. P. conveyed by deed, without reservation, an ashery, in which kettles were set in mason work, but the arches were upon a platform, and not fastened to the building. The troughs were sunk in the ground. M., who purchased the premises, demised the ashery; and the lessee entered into possession, and used the kettles until a fire consumed the building. The question being as to the fixtures, it was held that the fixtures passed by the conveyance. *Miller v. Plumb*, 6 Cow. Rep. 665.

If a freehold, fitted up for a trade of any kind, or for manufactures, is sold to a person intending to follow the same business, then all the machinery necessary to the trade or manufacture, so intended to be carried on, would pass. 1 Bailey S. C. Rep. 541. Consequently, a cotton gin which was attached to the gears in the gin-house, was held to be a fixture, which passed by the contract of sale. So, a conveyance of a saw-mill, was held to pass a mill-chain, dogs, and bars—they being in their appropriate places at the time. The chain was attached by a hook, to a piece of a draft-chain, which was fastened to the shaft by a spike. It could be hooked and unhooked, at pleasure. The chain was used to draw logs into the mill. *Fanar v. Stackpole*, 6 Greenl. 144. And where the stones and irons of a gristmill were accidentally detached by a flood, carrying away the main body of the mill, they were still holden to continue a part of the realty, and therefore not liable to be taken on execution to satisfy a creditor, as personal property. *Goddard v. Bolster*, 6 Greenl. Rep. 427. It has been held, however, that frames in a factory for spinning flax and tow, though fastened by upright pieces extending to the upper floor, and cleets nailed to the floor, round the feet, neither of the machines being nailed to the building, would not be considered as a part of the freehold. *Cresson v. Stout*, 17 Johns. Rep. 117, 121. See *Amos & Ferrard's Law of Fixtures*; Gibbon's do.

[2] In a case where there were several lots, it was stated, after two of them, that the timber on them was to be paid for. The particulars were

The expression "timber," includes oak, elm, and ash, everywhere; and, by local custom, beech(s) and various other trees; even trees which are primarily fruit trees, as cherry, chestnut, and walnut;(t) no wood, however, is timber until of twenty years' growth:(u) as a general rule, pollards would seem not to be timber; if sound they may, however, be timber by local custom: and the expression "timber and timber-like trees," would seem to include sound pollards:(v) an exception, in a lease, of "all timber \*and other trees, but not the annual fruit thereof," would seem not to include garden or orchard fruit trees, unless by local custom;(w) the term "fruit" being considered to refer to the mass of timber trees.

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What is  
"timber."

[\*62]

It is generally provided, upon a sale by auction, and often upon a sale by private contract, that any misdescription, mistake, or error in the particulars, either way, shall not avoid the sale, but shall be the subject of compensation.

As to mis-  
description  
and compen-  
sation.

Notwithstanding this condition, the mis-statement, if wilful or designed, amounts to fraud, and, even at law, avoids the contract as against the purchaser: if it arise simply from negligence, equity will, notwithstanding the condition, refuse a specific performance at the suit of the vendor, if the error be not a fair subject for compensation:(x) at law, cases have occurred, in which the opin-

Does not ex-  
tend to mis-  
description,  
if wilful;

(s) *Aubrey v. Fisker*, 10 East, 446.

(t) *Duke of Chandos v. Talbot*, 2 P. Wms. 606.

(u) *Foster v. Leonard*, Cro. Eliz. 1.

(v) *Rabbett v. Raikes*, Woodfall's Landl. and Ten. 457; and see 2 P. Wms. 606.

(w) *Bullen v. Denning*, 5 B. & C. 842.

(x) Sug. 30.

silent as to the timber on the other lots, which was of considerably greater value; but, there was a general condition that all the timber and timber-like trees, down to 1s. per stick, inclusive, should be taken at a fair valuation. The purchaser of the lots to which no statement was annexed, claimed the timber without paying for it; and the master of the rolls thought that a purchaser might be so fairly impressed with that idea, notwithstanding the general condition, that he refused to compel him to perform the contract, according to the seller's construction. Sug. on Vend. vol. 1, p. 42. *Higginson v. Clowes*, 15 Ves. jun. 516.

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or affecting  
the substan-  
tial subject-  
matter of the  
contract;

ion was entertained that, however gross the negligence, the purchaser is bound, if there be no fraud ;(y) but, this opinion has not been followed :(z) and the rule at law seems now to be as laid down by *Tindal*, C. J. ; viz., "that where the misdescription, although not proceeding from fraud, is, in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such a case the contract is avoided altogether, and he is not bound to resort to the clause of compensation : under such a state of things, he may be considered as not having purchased the thing which was really the subject of the sale." (a) [1]

(y) *Wright v. Wilson*, 1 Moo. & R. 207; and see *Mills v. Oddy*, 6 Car. & P. 728.

(z) Sug. 36.

(a) *Flight v. Booth*, 1 Bing. N. C. 370, 377.

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[1] It is a general rule that an act done, or contract made, under a mistake or ignorance of a material fact, is voidable and relievable in law and equity. No person can be presumed acquainted with all matters of fact. Neither is it possible, by any degree of diligence, in all cases, to acquire that knowledge. Consequently, an ignorance of fact does not import culpable negligence. The rule applies not only to cases where there has been a studied suppression or concealment of the facts by the other side, which would amount to fraud; but also to many cases of innocent ignorance, and mistake on both sides. So, if a party has *bona fide* entirely forgotten the facts, he will be entitled to relief, because, under such circumstances, he acts under the like mistake of the facts, as if he had never known them. But the fact must be material to the act or contract. For instance:—A. buys an estate of B., to which the latter is supposed to have an unquestionable title. It turns out, upon investigation of the facts, unknown, at the time, to both parties, that B. has no title; in such a case, equity would relieve the purchaser, and rescind the contract. But, if A. were to sell an estate to B. whose location was well known to each, and they mutually believed it to contain twenty acres, and, in point of fact, it contained only nineteen acres, and three-fourths of an acre, and the difference would not have varied the purchase, in the view of either party; the mistake would not be a ground to rescind the contract. Story's Eq. Juris. vol. 1, secs. 140, 141; *Smith v. Evans*, 6 Binn. Rep. 102; *Mason v. Pearson*, 2 Johns. Rep. 37; *Pearcon v. Low*, 6 Mass. Rep. 81; *Garland v. Salem Bank*, 8 Mass. Rep. 408; 8 Cow. Rep. 195; *Champlin v. Layton*, 18 Wend. 407; *Cummins v. White*, 4 Blackf. Ind. Rep. 356; 6 Harr. & Johns. 500, 525, 526; 2 Bailey's S. C. Rep. 623.

And where a vendor, who has the means of "knowledge, and is bound to use due diligence, misdescribes his property upon any important point, it seems probable that the facts would, in themselves, be deemed conclusive as to fraud : (b) *e. g.*, a statement in particulars that the estate was about one mile from Horsham, when in fact it was upwards of three miles distant ; (c) [1] and, in another case, a material mis-statement, upon the sale of a house, as to the amount of the ground rent, (d) and, in a later case, a description of dilapidated property, as "good and substantial, but unfinished buildings," (e) seem to have been considered, at law, to be, from their very nature, fraudulent.

Chapter IV.  
or caused by  
gross negli-  
gence.

If, however, the intended purchaser do not rely upon the particulars or statements of the vendor, but examine the property in person or by his agents, he cannot, in the absence of direct fraud, contend that he is deceived by the

But purcha-  
ser testing  
accuracy of  
particulars  
may be  
bound.

(b) See Sug. 36.

(c) *Duke of Norfolk v. Worthy*, 1 Camp. C. 337.

(d) *Mills v. Oddy*, 6 Car. & P. 728.

(e) *Robinson v. Musgrove*, 8 Car. & P. 469; but, in general, a mis-statement as to the state of repairs would seem to be a matter for compensation in equity: *Dyer v. Hargrave*, 10 Ves. 505, 508.

[1] In this case, it was insisted that the effect of misdescription was saved by the condition, which provided that no error or mis-statement should vitiate the sale. But Lord Ellenborough said that, in cases of this sort, he should always require an ample and substantial performance of the particulars of sale unless they were specifically qualified. Here there was a clause inserted, providing that an error in the description of the premises should not vitiate the sale, but an allowance should be made for it. This, he conceived, was meant to guard against unintentional errors—not to compel the purchaser to complete the contract, if he had been designedly misled. He therefore left it to the jury, whether this was merely an erroneous statement, or the misdescription was wilfully introduced to make the land appear more valuable, from being in the neighborhood of a borough town. In the former case, the contract remained in force, but in the latter case the plaintiff was to be relieved from it, and was entitled to recover back his deposit. The plaintiff had a verdict; so that the jury must have thought the misdescription fraudulent. See Sug. on Vend. vol. 1, p. 36; *M'Ferran v. Taylor et al.*, 3 Cranch, 270.

Chapter IV. representations of the vendor as to any point upon which he has thus tested their accuracy.(f)[2]

Cases where materiality of misdescription will avoid common condition.

And it may be collected from the cases at law and in equity, that, independently of fraud, and on the mere ground of the materiality of the misdescription, the usual condition as to compensation will not avail in the following cases, viz :—

Where property is of different nature;

1st. Where the property is not of the same description as it appears to be in the particulars ; as where long leasehold is described as freehold ;(g) or as where, upon the sale of an estate let at lease on a rack rent, such rent is described as a ground rent ;(h) or as where a house, composed \*externally partly of brick and partly of timber and lath and plaster, is described as a brick-built house.(i)

[\*64]

or not identical ;

2dly. Where the property, as described, is not identical with that intended to be sold : as when a vendor, intending to sell No. 2 in a street, described it as No. 4, the purchaser, although No. 2 was the same description of house as, and in better repair than, No. 4, recovered his deposit at law.(j)

or material part of it is wanting, or has no title ;

3rdly. Where a material part of the property described has no existence, or cannot be found ;(k) or where no title

(f) See *Atwood v. Small*, 6 Cl. & Fin. 232 ; see the judgment in *Clapham v. Shillito*, 7 Beav. 149.

(g) See and consider *Browne v. Fenton*, 14 Ves. 144.

(h) *Stewart v. Alliston*, 1 Mer. 26.

(i) *Powell v. Double*, Sug. 30.

(j) *Leach v. Mullett*, 3 Car. & P. 115.

(k) *Robinson v. Musgrove*, 2 Moo. & R. 92.

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[2] If the purchaser have particular personal information given him of an incumbrance, or of the nature of the title, it seems that parol evidence is admissible. It may therefore be proved that the purchaser perused the original lease before the sale, as that does not contradict the particulars of sale ; but after such evidence is received, it would be difficult to act upon it at law against a direct statement in the particulars that is to bind the purchaser to the knowledge of a fact contrary to the written statement. For the reading the lease at an auction by the auctioneer, is no excuse for a misdescription of the terms of the lease in the particulars of sale. Such evidence may be used in equity, as a defence against the specific performance, if the parol variation was in favor of the defendant, and the plaintiff seek a performance in specie according to the written agreement. See 1 Sug. on Vend. vol. 1, p. 29, and authorities.

can be shown to it; as when, upon the sale of a leasehold house and a small yard adjoining, the yard was not included in the lease, but held from year to year at a separate rent.<sup>(l)</sup> Chapter IV.

4thly. Where the misdescription is upon a point material to the due enjoyment of the property; as when, upon the sale of a lease of a house and shop, the particulars merely stated that the lease contained a restriction against certain specified trades being carried on upon the premises, whereas in fact several *other* trades were forbidden:<sup>(m)</sup> so also, where, upon the sale of a piece of land described as "a first rate building plot of ground," no notice was taken of a right of way passing over it,<sup>(n)</sup> or of an underground watercourse which third parties had liberty to open, cleanse, and repair, making satisfaction for damage thereby occasioned.<sup>(o)</sup> or its due enjoyment is materially affected;

5thly. Where the misdescription is of such a nature that the amount of compensation cannot be estimated; as where, on the sale of a reversion, expectant on the decease of A. in case he should have no children, his age was described as 66 instead of 64;<sup>(p)</sup> or as where, on the sale of a wood, the particulars erroneously stated that the *average size* of the timber approached 50 feet, the *number* of trees not being stated;<sup>(q)</sup> or as where the particulars stated the premises to be in the joint occupation of A. and B. as *lessees*, when in fact A. was only assignee of the lease, and B. was a mere joint occupier.<sup>(r)</sup> or amount of compensation cannot be estimated;  
[\*65]

And it may be observed, that where the vendors are trustees they are not justified in allowing compensation for their own errors, and a court of equity will refuse to act upon the condition.<sup>(s)</sup> Whether trustees can use conditions as to misdescriptions.

(l) *Dobell v. Hutchinson*, 3 Ad. & El. 355.

(m) *Flight v. Booth*, 1 Bing. N. C. 370.

(n) *Dykes v. Blake*, 4 Bing. N. C. 463; and see *Gibson v. D'Este*, 2 Y. & C. C. C. 542.

(o) *Shackleton v. Sutcliffe*, 1 De G. & S. 609.

(p) *Sherwood v. Robins*, Mood. & Malk. 194; and see 8 Cl. & Fin. 792.

(q) *Lord Brooke v. Roundwaite*, 5 Ha. 298.

(r) *Ridgway v. Gray*, 1 Mac. & G. 109.

(s) *Waite v. Cuddon*, 8 Cl. & Fin. 766.

## Chapter IV.

As to deeds ;  
prima facie  
liability of  
vendor to  
produce and  
deliver up  
on comple-  
tion, or fur-  
nish attested  
copies.

[\*66]

As to attested  
copies ; sol-  
licitors liabi-  
lity for omit-  
ting condi-  
tion.

Course to be  
adopted  
upon sale of

In the absence of stipulation, a vendor is bound to produce, at his own expense, the originals of all deeds and other instruments necessary to verify the abstract ;(t) except copies of court roll, and such instruments as are upon record,(u) or have been lost(v) or destroyed ; as respects all which he may verify his abstract by secondary evidence ; he must, however, as a general rule, in order to render copies admissible in evidence, prove the execution and delivery of the originals ;(w) which, when deeds are lost and the witnesses unknown, is often an insuperable difficulty : when the sale is completed, the purchaser is entitled to the original title deeds, or a covenant to produce them, and attested copies of the originals ;(x) \*this right, however, does not seem to extend to old deeds not necessary to make a title ;(y) or to copies of court roll, or instruments on record, unless, (as respects the covenant for production,) they are in the vendor's possession or power ;(z) or to documents used merely as negative evidence : (a) the attested copies and deed of covenant must be prepared at the expense of the vendor : (b) if he wish to negative the purchaser's rights in the above respects, he must do so clearly and explicitly in the conditions : and when property is sold in lots, it is the almost invariable practice to throw the expenses of attested copies upon the purchasers, and a solicitor would generally incur personal liability by omitting a condition to that effect : the condition, if so intended, should expressly provide for the expense of all attested copies, whether required for the verification of the abstract or for any other purpose ; particular care to insure proper conditions as to deeds should be

(t) Sugden, 449.

(u) *Cooper v. Emery*, 1 Phil. 388. It seems doubtful whether the rule extends to deeds inrolled merely for safe custody and not under any statutory provisions ; see 9 Jarm. Conv. by Sweet, 10.

(v) As to what is sufficient evidence of loss, see *Green v. Bailey*, 15 Sim. 542 ; *Fitzwallter Peerage*, 10 Cl. & Fin. 953 ; *Hart v. Hart*, 1 Ha. 1.

(w) *Bryant v. Busk*, 4 Russ. 1 ; see however as to this, *infra*, Ch. VIII.

(x) *Boughton v. Jewell*, 15 Ves. 176.

(y) *Dare v. Tucker*, 6 Ves. 460.

(z) *Vide infra*, 316.

(a) See *Cooper v. Emery*, cited in 1 Hayes on Conv. 573.

(b) *Boughton v. Jewell*, 15 Ves. 176.



taken upon the sale of a part only of an estate in mortgage, when the purchase-money is not likely to pay off the incumbrance; a deposit of the deeds with some third party, for the joint benefit of the mortgagee and purchaser, will, if acquiesced in by the mortgagee, be the most eligible arrangement.(c)

Chapter IV.  
part of  
mortgaged  
estate.

On a sale in lots, it is generally requisite to provide for the ultimate custody of the deeds; the purchaser of the largest lot is usually made to take them and covenant for their production: where the intention is that they shall belong to the purchaser whose purchase-money amounts to the largest sum, it may occasionally be well to provide for the contingency of the two largest purchasers buying to an equal amount.

As to ultimate custody of deeds, on sale in lots.

Every condition intended to relieve the vendor from his *prima facie* liability to deduce a marketable title, and to verify the abstract by proper evidence at his own expense, must be expressed in plain and unambiguous language.(d)[1]

Restrictive of purchaser's rights to title and Evidence, must be explicit.

[\*67]

For instance, a condition that he shall not be bound to produce any original deed or other document than those in his possession and set forth in the abstract, was held

Against production of deeds. Vendor still bound to verify abstract *alibi*.

(c) Sug. 457.

(d) *Osborne v. Harvey*, 7 Jur. 229, V. C. K. B.; and see *Clarke v. Faux*, 3 Russ. 320.

[1] A stipulation in a contract, that, in case the vendor cannot deduce a good title, or if the purchaser shall not pay the money on the appointed day, the agreement shall be void, does not enable either party to vitiate the agreement, by refusing to perform his part of it: the seller may avoid the contract, if the purchaser do not pay the money; the purchaser may avoid it, if the seller do not make a title; or the contract will be void, if the seller cannot make a title; but it is not sufficient for him to say that he cannot.

It is the better opinion that a court of law will regard equitable defects in a title; but it will not take notice of doubtful title, and it will adjudge a title to be good or bad, without inquiring whether it be marketable, or not. *Maberly v. Robins*, 5 Taunt. 625, 626; *Romilly v. James*, 6 Taunt. 274. Where property is sold in lots, it seems that the contract, in respect of each lot, will be considered as distinct from the rest, unless there is a special agreement to connect them; and therefore a defect in the vendor's title as to some of the lots will not prevent him from recovering the price to be paid for the others. Phil. Ev. vol. 3, p. 88.

## Chapter IV.

not to relieve him from his liability to verify the abstract; for *non constat* that because he has only certain specified deeds in his possession he cannot prove his title.(e)

Against production of lessor's title; purchaser may prove lease void.

So, on an agreement by a vendor to sell a lease "as he held the same" for twenty-eight years, a condition that the purchaser should not require the lessor's title, would not, it appears, prevent the latter from showing that the lease was invalid.(f)

Or more underlease, with joint liability of original covenants.

So, upon a sale of an underlease, described simply as a lease, a stipulation that the vendor should not be called upon to prove his title, was held to be worthless, when it appeared that the original lease comprised other premises, and contained covenants embracing both properties, and exposing the purchaser to eviction through the default of the holder of such other premises.(g)

As to recitals being evidence.

It may be doubted whether, in the absence of express stipulation, the common condition, as to recitals being evidence, would bind the purchaser to accept recitals as evidence of conclusions of law.(h)

Condition if explicit will bind purchaser.

[\*68]

But a clear stipulation as to title is binding on a purchaser; e. g., an agreement by assignees of a bankrupt to sell his estate "under such title as he recently held the same, an abstract of which may be seen;(i) and a condition that the purchaser should accept the vendor's title "without dispute."(k)

That abstract shall commence with specified document.

A condition, however, that the abstract shall commence with a specified document, merely precludes the purchaser from objecting to the title as commencing at too recent a period;(l) so that, if the instrument in question do not

(e) *Southby v. Hutt*, 2 Myl. & Cr. 207; and see *Dick v. Donald*, 1 Bli. N. S. 655.

(f) See Sug. 391; and see judgment in *Shepherd v. Kealley*, 1 Cro. M. & R. 127, 128, disapproving of *Spratt v. Jeffery*, 5 Man. & R. 138; but see 2 Coll. 341.

(g) *Blake v. Phinn*, 3 C. B. 976; see *Fildes v. Hooker*, 3 Madd. 193.

(h) 9 Jarm. Conv. by S. 4.

(i) *Freme v. Wright*, 4 Madd. 364.

(k) *Duke v. Barnett*, 2 Coll. 337; and see Sir Edward Sugden's remarks, V. and P. 395, 396, on *Cattell v. Corral*, 3 Y. & C. 413; and see *Corral v. Cattell*, 4 Mee. & W. 734; but see also *Smith v. Ellis*, 14 Jur. 682.

(l) *Sellick v. Trevor*, 11 Mee. & W. 722.

form a good root of title, he may require the earlier title; Chapter IV. so, a mere condition against production of the earlier title, would not preclude him from requiring the production of recited instruments which appear from their recitals to be of a suspicious character.<sup>(m)</sup>

Nor will a mere condition against production, in any case prevent a purchaser from investigating and objecting to the earlier title, if he have the collateral means of doing so.<sup>(n)</sup> Does not preclude objections.

If, therefore, the earlier title merely be wanting, the condition should provide for the abstract commencing with a specified document, (the nature and effect of which should be stated, if it be of such a kind as not to form a satisfactory root of title; *e. g.*, a recovery deed;) and the purchaser should be precluded from requiring the production of the earlier title, or of any earlier documents which may be recited or noticed in the abstracted title: if the earlier title be defective, or if the recited missing instruments are of a suspicious character, the condition should be extended, so as preclude him from requiring, investigating, or making any objection to the earlier title, or any document prior to the commencement of the abstract, although subsequently recited or referred to. How to be framed when early title lost or defective.

And when a vendor, although not having a marketable, [\*69] \*has still a safe holding title, it may be prudent, in using very special conditions, to state, that an abstract of the title may be inspected before the sale. Production of abstract before sale sometimes advisable.

It is often requisite to insert conditions providing for defects in evidence of the identity of the parcels; such conditions, however, will not relieve the vendor from the necessity of pointing out what the entire property is which he intends to convey; nor, (unless expressly framed to meet the case,) will they do more than provide for mere *deficiencies* in evidence; that is, they will not provide for *repugnancies*. As to identity of parcels.

For instance, a condition that a certain plot of land could not be properly identified by the vendor, but it be- When part of property cannot be found;

(m) *S. C.*

(n) *Shepherd v. Kcalley*, 1 Cro. M. & R. 117.

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ing fairly presumed that the purchaser, by inquiry in the neighborhood, would be able to ascertain its true situation, he was to accept the plot by the description only contained in the conveyance deed of it, was held worthless, even at law, when it appeared that the plot did not exist or could not be discovered.(o)[1]

or descriptions  
are  
inconsistent;

So, a condition that no further evidence of identity of the parcels should be required than what was afforded by the deeds, instruments, and other documents abstracted, did not preclude a purchaser from requiring further evidence on the ground of the descriptions of the parcels in

(o) *Robinson v. Musgrove*, 2 Moo. & R. 92.

[1] In this case, it appeared that a sale by auction was made under a power in an annuity deed, and the estate was described as a substantial brick building, and two plots of ground, the whole estimated to let at 35*l.* per annum; that the plot, not identified, could not be found, and the property was not what is called a substantial brick building, and would not bring the rent stated. The chief justice was of opinion that if any substantial part of the property had no existence, or could not be found, the purchaser might rescind the contract *in lots*, even if the seller was not guilty of any fraudulent misrepresentation in that respect, deficiency in value might be fit matter for compensation, but not the total absence of one of the things sold. With reference to the general description, was that, the learned judge asked the jury, a *bona fide* description, or not? If they thought it an exaggerated description, quite beyond the truth, and that the seller was not acting *bona fide* when he gave it, that circumstance alone would entitle the purchaser to rescind the contract, notwithstanding the language of the condition as to errors.

In another case, where upon a sale by auction, the above mentioned condition was inserted in the conditions of sale, it appeared that the house was leasehold, but that a small yard mentioned in the particulars, was not included in the lease, but was held from year to year at a separate rent; and although it did not appear that the sellers who had recently acquired the premises, were aware of the fact; yet as the yard was proved to be an essential part of the premises, and was held only from year to year, instead of for the term, in the house as stated in the particulars, and at a separate rent, the court held clearly that the defect was not matter of compensation. *Dobell v. Hutchinson*, 3 Adol. & Ell, 355, cited in 1 Sugd. on Vend. 38.

And where the misdescription, although an unintentional one, is such as would induce a person to bid, who really wanted the subject as described, and not the subject as it exists, or, perhaps, in other words, where there is a substantial misdescription, it will not fall within the condition. *Ib.*

the abstracted documents varying from those in the particulars and from each other. *(p)* Chapter IV.

In the case of copyholds, the generality and vagueness of the descriptions on the court rolls are unimportant, if the vendor can show that the property has been actually held under such descriptions. *(q)* vague descriptions of copyholds sufficient.

The courts, it may be remarked, look with jealousy on conditions negating a purchaser's right to the usual and reasonable evidence of title; they should not be used to a greater extent than is necessary, as their tendency is to damp the sale; and this, not so much by diminishing the biddings of parties who actually attend, as by keeping away others who are alive to their objectionable character; it cannot, however, be denied, that the prejudicial effect of even the most stringent conditions is practically far less than might be reasonably anticipated. Stringent conditions not favored by court. [70]

And it may be observed, that, on a sale in lots, the vendor should either verify the abstract at his own expense, or the expense of verification should be divided among the purchasers in some specified proportion; otherwise the purchaser who first calls for evidence may be at the sole cost of procuring it. Abstract on sale in lots, should be verified at vendor's expense.

"There must be express conditions where the vendor intends to throw upon the purchaser the expense of such searches as are usually made by the vendor, of travelling to a distance to examine the abstract with the deeds, or the like." *(r)* As to expense of searches, &c.

If the estate be subject to incumbrances which cannot be discharged, they must be mentioned in the particulars or conditions; it often happens that property is subject to charges which, from particular circumstances, (such as there being ample security,) are never likely to be enforced, although they cannot be immediately released; in such cases it is advisable to state the facts as clearly and openly as possible, and stipulate that the purchaser shall make no objection in respect of the matters so men- As to indemnity against charges, &c.

*(p)* *Flower v. Hartopp*, 6 Beav. 476.

*(q)* *Long v. Collier*, 4 Russ. 267.

*(r)* Sug. 38.

## Chapter IV.

As to time  
for object-  
ions, &c. ;

[\*71]

"Satisfac-  
tory" means  
"market-  
able" title.

Not to be re-  
lied on by  
vendor  
knowingly  
selling with  
a defective  
title.

tioned; if, as may often be the case, an indemnity be offered, its nature should be explicitly stated.(s)[1]

It has become very usual to insert conditions restrictive of the time within which objections may be taken to the \*title; and enabling the vendor to annul the sale, if objections are taken which he is unable to remove; the latter condition, in fact, is inserted by many practitioners, as a matter of course, in all but the very plainest cases; and its insertion by a mortgagee, selling under a power with a title believed to be marketable but somewhat complicated, was approved of by a late very eminent conveyancer: if the condition be for rescinding the contract in case the title shall not prove "satisfactory" to the purchaser, this will not authorize him to make any other than the usual objections.(t)

This condition, however, cannot be relied upon by a vendor who knowingly enters into the contract with a clearly defective title to a portion of the estate: for instance, where a person, entitled in remainder subject to a life estate, contracted to sell the fee simple in possession, hoping that the tenant for life would concur, which she refused to do, the purchaser was allowed to take the reversion with a compensation, although there was a condition for rescinding the contract if a good title could

(s) See 3 Dav. Conv. 68. A condition to give a specified indemnity will be specifically enforced in equity; *Walker v. Barnes*, 2 Madd. 247.

(t) *Lord v. Stephens*, 1 Y. & C. 2 Ex. 222.

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[1] Where incumbrances and defects in the title to an estate exists, the vendor is bound to acquaint the purchaser with the facts, if they do not appear on the title deeds. If a vendor neglect this, he is guilty of a direct fraud, which the purchaser, however vigilant, has no means of discovering. If, therefore, a seller knows and conceals a fact material to the title, there is no principle upon which relief can be refused to the purchaser. And Lord Hardwicke laid it down, that even if an attorney of a vendor of an estate, knowing of incumbrances thereon, treat for his client in the sale thereof, without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce a buyer to trust his money upon it, a remedy lies against him in equity, (relief, might now be obtained at law:) to which principle it is necessary for the court to adhere to preserve integrity and fair dealings between man and man. 1 Ves. 96.

not be made, which condition the vendor wished to enforce.<sup>(u)</sup> Chapter IV.

Nor will the condition enable a vendor to refuse to show a title, or, perhaps, in any case, to rescind the contract as against a purchaser who is at once willing to waive the objection or requisition and take the property without compensation :<sup>(v)</sup> but it will enable a vendor, who has in fact a good title, to rescind the contract, upon an untenable objection being taken and persisted in.<sup>(w)</sup>

Nor as against purchaser willing to complete without compensation:

but will hold good if untenable objection is persisted in.

\*Where a purchaser required that certain annuitants under a will should join in the conveyance, this was held to be an objection to the title within the meaning of such a condition :<sup>(x)</sup> the condition should, however, in terms extend to requisitions.

[\*72]

Extends to requisitions.

And, as a general rule, a vendor by replying to the purchaser's objections or requisitions, waives the right of rescinding the contract, and also the benefit of the condition limiting the purchaser's time for taking objections, &c. (that is, supposing them not to have been taken within such limited time.)<sup>(y)</sup>

Right to rescind, lost by replying to objections.

It seems, however, probable that mere argumentative replies would not amount to such a waiver : and that replies of any description, if returned "without prejudice," or with any similar reservation of the vendor's rights, would escape the rule laid down in *Turner v. Smith* :<sup>(z)</sup> or the rule may, it is conceived, be avoided, by the introduction, into the condition, of the words "notwithstanding any intermediate negotiations," or some equivalent expression.

Unless replies are merely argumentative or returned without prejudice.

For the purposes of such conditions time runs from the

Time runs

(u) *Nelthorpe v. Holgate*, 1 Coll. 203; but see *Thomas v. Dering*, 1 Keen, 728.

(v) See and consider *Roberts v. Wyatt*, 2 Taunt. 268; *Page v. Adam*, 4 Beav. 268; *Williams v. Edwards*, 2 Sim. 78.

(w) *Page v. Adam*, *ubi supra*. N.B.—In the third marginal placitum, it should be, "the objection being held invalid," instead of "the objection being held valid."

(x) *Page v. Adam*, 4 Beav. 269.

(y) *Tanner v. Smith*, 10 Sim. 410; see the same case on appeal, 4 Jur. 310; *Cutts v. Thodey*, 13 Sim. 206.

(z) See *Morley v. Cook*, 2 Ha. 106.

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from deliv-  
ery of per-  
fect ab-  
stract;  
meaning of  
the term.

delivery of a perfect abstract ; that is, an abstract as perfect as the vendor, at the time of delivery, has in his either actual or constructive possession ;(a) but a vendor would not be at liberty designedly to deliver an imperfect abstract, or otherwise neglect his duties under the contract, for the purpose of rescinding the contract under such conditions.(b)

Objections  
arising upon  
subsequent  
evidence,  
may be  
taken, when.

[\*73]

And the condition as to time does not preclude a purchaser from taking subsequent objections arising out of evidence called for before the expiration of the limited \*time : (c) such objections must, however, it is submitted, be taken within a corresponding period after the production of such evidence.

As to resale,  
and forfei-  
ture of depo-  
sit; how far  
binding.

It is usual, and proper, to insert a condition providing for a resale of the property, and forfeiture of the deposit, in case the purchaser fail to comply with the conditions ; and that any deficiency upon such resale, together with the costs thereof, shall be borne by the purchaser ; equity, however, will, at least when the purchaser is bankrupt, (d) set off the deposit against such deficiency ; and the vendor's equitable right to the deposit in any case where the purchaser is able and willing to put him in the situation in which he would have been had the contract been duly performed, is doubtful : (e) if, upon a resale, the estate were to produce more than the original purchase-money, the purchaser who had violated his agreement could not call for an account of the surplus : (f) a stipulation that the purchaser making default shall pay a specified sum, (exceeding the amount of the deposit,) as liquidated damages, does not amount at law to a condition for the forfeiture of the deposit.(g)[1]

Condition  
for payment  
of penalty  
by purchaser  
not equiva-  
lent to con-  
dition for  
forfeiture.

(a) *Morley v. Cook*, 2 Ha. 111.

(b) *Page v. Adam*, *ubi supra* ; *Morley v. Cook*, *ubi supra* ; *Roberts v. Wyatt*, 2 Taunt. 268.

(c) *Blacklows v. Laws*, 2 Hare, 40.

(d) *Ex parte Hunter*, 6 Ves. 94.

(e) Sug. 51 ; *Moss v. Matthews*, 3 Ves. 279.

(f) *Per Curiam*, 6 Ves. 97.

(g) *Palmer v. Temple*, 1 Per. & Dav. 379.

[1] "The usual condition" says Sugden, (1 Sug. on Vend. 47) that if



In the preparation of special conditions it is important to remember, that a purchaser, unless specially precluded from so doing, may require evidence of all matters of fact stated in any condition which goes to restrict his *prima facie* rights: (h) it is, in fact, suggested by Mr. Jarman, (i) that the ordinary condition throwing upon the purchaser the expense of procuring evidence to verify the abstract, does not preclude him from requiring all such information as to facts as is necessary to complete the abstract; "so that, although precluded from requiring, except at his

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Matters of fact stated must be proved.

Whether purchaser precluded from evidence, may require information.

[\*74]

(h) *Symons v. James*, 1 Y. & C. C. C. 487.

(i) *Conv. v. ix.* p. 53.

the purchaser shall fail to comply with the conditions, the deposit shall be forfeited, and the proprietors be at liberty to re-sell the estate; and the deficiency, if any by such sale, together with all charges attending the same, shall be made good by the defaulter, should never be omitted. It forms a lien on the estate for the purchase-money, &c., and if the purchaser do not comply with the conditions, the vendor may, by virtue of this stipulation, re-sell the estate, and recover the deficiency and charges from the purchaser. And if the money produced by the second sale exceed the original purchase-money, the purchaser who has violated the agreement will not be entitled to the surplus, but the vendor himself, will be entitled to retain it. It is now usual to stipulate, that in case of default by the purchaser, he shall forfeit the deposit, and that the amount of the expense of a re-sale, &c., shall be recoverable as *stipulated damages*. Upon such a stipulation, Lord Tenterden held at *nisi prius* that whether the term used was penalty or liquidated damages, a party who claims compensation for default, should only be allowed to recover what damage he had really sustained. He confined his opinion to contracts not under seal; instruments in that form, might, perhaps, receive a different construction. But in a later case, before Best, C. J., he expressed a different opinion—that whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict, in action for the breach of it, should be the stipulated sum. But whichever be the correct opinion, a jury may, without proof of damage, give the whole sum named. This observation applies to a stipulation that the deposit shall be forfeited, and belong to the seller as stipulated damages. Where the expenses of the re-sale, &c., are stipulated for, the measure of damages would be those expenses, &c. But a condition that if the purchaser shall neglect, or fail to comply with any of the conditions, the deposit shall be forfeited as liquidated damages, to be retained by the seller, with power to him to rescind the contract and re-sell, and the deficiency to be made good by the purchaser, does not preclude the seller from maintaining an action for general damages, where the purchaser breaks off from the contract altogether. It applies in case of a breach of any of the particular conditions."

Chapter IV. own expense, any evidence of a death (material to the title,) he may yet insist on being informed when and where such death occurred; in many cases the expense of obtaining such information would be nearly the same as that of obtaining the usual evidence of the fact; and the point, although (it is conceived) not often insisted on in practice, may sometimes be usefully guarded against by the conditions.

(4.) *As to what special conditions are generally requisite in various specified cases.*

What conditions expedient on sale of inclosed lands.

Upon a sale of lands held under an Inclosure Act, it will often be expedient to negative the purchaser's *prima facie* right to evidence of the validity and regularity of the award: (j) and attention must be paid to the rule which, when an allotment has been made indiscriminately in respect of lands held under different titles, requires the production and proof of all such titles; a rule which, if not guarded against, may occasionally lead to expenses which will swallow up the purchase-money.

Land formerly waste.

Where the property comprises strips of waste land, recently inclosed, some special stipulations as to title will almost invariably be necessary. (k)

Enfranchised copyholds.

Where the property has been recently enfranchised, (l) the production of the manorial title must be guarded against, if the vendor be unable to produce it: or, if produced, it may be well to guard against the rule which \*enables a purchaser to require evidence of the manor having, since the enfranchisement, been enjoyed conformably with the earlier title. (m)

[\*75]

Where, in the case of copyholds, the title depends upon grants, made by the lord of the manor, of part of the

(j) 3 Dav. Conv. 58; but this seems to be rendered unnecessary by the 3 and 4 Vict. c. 31, in cases coming within its provisions: the want of enrolment of the award is remedied by the 3 and 4 Will. IV. c. 87, in cases where the award was executed before the passing of the Act.

(k) See, as to the presumption of ownership of such strips, *Scoones v. Morrell*, 1 Beav. 251; *vide infra*, Ch. VIII.

(l) *Vide infra*, Ch. VIII.

(m) See 1 Jarm. Conv. by S. 83.

waste, it will, in general, be expedient to provide that no evidence shall be required of such grants being authorized by the custom of the manor; in some manors, however, the right is well established.

Chapter IV.

Copyhold  
formerly  
part of  
lord's  
waste.

Upon a sale of leaseholds, the following points will require attention.

Leaseholds.

To negative the purchaser's right to the production of the lessor's title, if, as generally happens, the vendor cannot produce it; if the interest to be sold be an underlease, the condition should (if so intended) clearly refer to the title as well of the sub-lessor as of the original lessor; if, however, the lease be by a bishop, a purchaser has no *prima facie* right to production, and any condition respecting the lessor's title may be omitted.(n)

Against  
production  
of lessor's  
title.

The covenants in the lease should never be referred to as "usual;" the preferable plan is to produce an abstract or copy of the lease at the time of sale; and to state the intention so to do in the particulars or conditions, and to stipulate that the purchaser shall be deemed to have full notice of its contents.

Covenants  
in lease, how  
to be  
noticed.

It is also, in general, necessary to provide, that certain specified evidence (usually the production of the last receipt for rent,) shall be sufficient evidence of the performance of the covenants and conditions in the lease, up to the completion of the purchase.(o)

As to evi-  
dence of  
covenants,  
&c., having  
been per-  
formed.

\*When leasehold property is sold in lots, it is also necessary to provide for the apportionment of the rents and liabilities under the lease: this cannot be done effectually where, as is usually the case, the lessor refuses, or is incompetent, to concur; underleases, (the original term being retained either by the vendor or one of the purchasers,) with covenants for mutual indemnity, are frequently resorted to; in fact necessarily so, where, in the case of buildings, the original lease contains a covenant to insure against fire in a given sum: cross powers of distress

[\*76]

As to ap-  
portionment  
of rent and  
liabilities on  
sale in lots.

(n) *Vide infra*, Ch. VIII.

(o) With respect to the necessity of such a condition, see, as to insurance, *Penniall v. Harborne*, 12 Jurist, 159: but the condition, it is conceived, would not avail if the purchaser could show that the conditions had been broken.

Chapter IV. and entry are often relied on in other cases; but the plan proposed, whatever it be, should be stated in the conditions.(p)

On sale of renewable leaseholds. Upon the sale of renewable leaseholds, it will probably be necessary to provide against the production of the title prior to the subsisting lease.(q)

On sale of a reversion. Upon the resale of a reversion, it may often be necessary to provide, that no evidence shall be required of the sufficiency of the consideration paid on the original purchase;(r) if such purchase, however, were by auction, the condition would seem to be unnecessary.(s)

(5.) *General remarks on special conditions.*

As to use of special conditions by trustees, &c. Upon sales by trustees, mortgagees, and other persons filling a fiduciary character, great care is requisite in the use of special conditions; since, if improperly used, they may not only involve the vendors in personal liability to their *cestui que trust*, &c., but also prevent their making a good title.

When it amounts to breach of trust. In order to have this effect the conditions must be unnecessary, and of such a depreciatory character that [\*77] \*their use amounts to a breach of trust: it may, however, often be difficult to determine whether a given condition comes within this definition.

Use of certain special conditions by mortgagee approved of. Upon a sale by a mortgagee, the use of conditions compelling a purchaser to take all objections within 21 days from the delivery of the abstract, that all copies of deeds, &c., not in the vendor's possession, should be obtained at the expense of the purchaser, that any mis-statement, &c., should not annul the sale but be the subject of compensation, and that the vendor might resell on breach of conditions by the purchaser, was considered by Lord *Langdale* to form no objection to the title.(t)

Upon a sale by a mortgagee, with a title believed

(p) See 3 Dav. Conv. 84.

(q) *Vide infra*, Ch. VIII.

(r) See *Boswell v. Mendham*, 6 Madd. 373.

(s) *Shelly v. Nask*, 3 Madd. 232; *et vide infra*, Ch. XIV.

(t) *Hobson v. Bell*, 2 Beav. 17; and see *Borell v. Dann*, 2 Hare, 443, 445.

to be marketable, although complicated, the use of a condition authorizing the mortgagee, in the event of objections, &c., being taken which he could not remove, to rescind the contract on returning deposit, interest, and costs, and of a condition that purchasers, whose purchase-money should not amount to a specified sum, should pay for their abstracts, (except the abstract of the mortgage deed,) was sanctioned by a late very eminent conveyancer.

On a sale in a single lot, there would seem to be considerable difficulty in drawing any distinction between a condition throwing on a purchaser the expenses of copies of deeds, &c., (as in *Hobson v. Bell*,) and one imposing on him *any* expenses connected with the sale which would be incurred merely on his own requisition, whether regarding the verification of the abstract or otherwise: in each case, the purchaser submits to pay certain indefinite expenses in the event of his insisting on their being incurred; and, in general, the trust estate probably saves in costs what it loses in purchase money. The case, however, is different on a sale in several lots, where the expenses of verifying the abstract are thrown generally on the purchasers; for then, although the expenses can be but once saved to the estate, each purchaser may think that he will have to bear them, and may be supposed to reduce his biddings accordingly.

As to expenses, difference suggested between use of such conditions by trustees, &c. on sale in several lots and on sale in one lot.

[\*78]

Conditions restrictive of a purchaser's right to a marketable title, or the ordinary evidences of title, should be used only so far as may be requisite from the state of the title.<sup>(u)</sup>

As to title &c., should be adapted to particular title.

Powers of and trusts for sale, at the present day, usually authorize a sale "under special conditions as to title, evidences of title, expenses or otherwise;" such an authority may reasonably be supposed to give to a fiduciary vendor somewhat wider limits than he would otherwise enjoy, and would probably turn the scale in a doubtful case; but it is hard to say what is its precise effect; it certainly would not authorize capricious or obviously unnecessary conditions, and necessary or provident conditions may and

Power to sell under special conditions, its effect.

(u) *Supra*, p. 34; see, however, *Borell v. Dann*, 2 Ha. 443, 445.

Chapter IV. should be used *without* an express authority: it has, however, become very usual to insert in such trusts and powers a declaration, that the use of unnecessary or improper conditions shall not affect the sale; but even such a declaration, of course, does not relieve a fiduciary vendor from liability to his beneficiaries.

Condition as to misdescriptions useless to trustees, &c. And the condition as to compensation for misdescription by the vendor, cannot, it appears, be enforced upon a sale by trustees, &c.(v); although the use of the condition may not in itself be a breach of trust.(w)

As to covenants on sale by trustees, &c. Although it is a general rule that a trustee or mortgagee, &c., enters into no covenant except that against incumbrances,(x) it is not unusual to insert a special condition to that effect.

Concluding remarks on special conditions.

[\*79]

\*Lastly, it may be remarked, that those conditions which to an unprofessional eye appear the simplest, are often the most dangerous; and those which appear difficult and complex to the unlearned purchaser may not unfrequently produce an impression favorable to the title upon the mind of his legal adviser. The conveyancer who, upon the purchase of a large estate, peruses a series of special stipulations, which have evidently been framed with reference to points which might be made matters of serious annoyance by a litigious, but are of little practical importance to the willing purchaser, is naturally disposed to believe that no real difficulties exist where minor objections have been so carefully anticipated; and, on the other hand, nothing is more common than to see conditions whose concise simplicity disarms the suspicion of the unprofessional reader, but whose sweeping clauses reduce counsel to the dilemma of either advising a client to complete under serious uncertainty whether he will acquire even a tolerable safe holding title, or of involving him in inquiries, which are almost sure to be heavily expensive, and may probably prove wholly unsatisfactory.

(v) *White v. Cuddon*, 8 Cl. & Finn. 766.

(w) See *Hobson v. Bell*, 2 Beav. 17.

(x) See *Worley v. Frampton*, 5 Ha. 560.

## \*CHAPTER V.

## AS TO THE SALE AND MATTERS CONNECTED THEREWITH.

1. *Auction, what it is.*
2. *Auctioneer, his liabilities, power, and remuneration.*
3. *Agent, his liabilities, power, and remuneration.*
4. *The deposit.*
5. *As to puffings and reserved biddings on a sale by auction.*

(1.) An auction, in the widest sense of the term, is any mode of sale, however conducted, in which the vendor comes under an express or implied obligation to part with the property to the highest bidder : (a) an express direction to sell by auction, would, however, it is conceived, only authorize a sale by auction in the usual mode. [1]

Auction ;  
what it is.

Direction to  
sell by.

(2) *As to the Auctioneer, &c.*

An auctioneer selling without sufficient authority or not disclosing the name of his principal, is liable to the purchaser for his costs, and interest on his purchase-money if lying idle ; (b) and it has been held that if he sell, without at the time of sale disclosing the name of his principal,

Auctioneer  
is personally  
liable, if  
selling with-  
out author-  
ity or not  
disclosing  
name of  
principal.

(a) See Sug. 11.

(b) Sug. 44.

[1] Notice of an intended sale by auction, is said to be a contract with all the world : and the parties to whom the notice is addressed, ought not to be put to the trouble and expense of attending the auction unless the sale is to take place. It often happens that estates advertised to be sold by auction, are sold by private contract, instead of being brought to the hammer, and the sale is not announced to the public, till the day fixed for the auction, and even sometimes not till the auctioneer's appearance in the auction room. It would be better therefore to state in the advertisements, that the estate will be sold at auction, at the place and time fixed upon, "unless previously sold by private contract ; in which case, notice of such sale will be made public : " and notice should be given accordingly. See Sug. on Vend. vol. 1, p. 51.

Chapter V. pal, he is personally liable in damages for non-performance of the contract.(c)[2]

Cannot vary terms after sale.

[\*81]

Can only receive deposit; is liable if purchaser is allowed to retain it.

The auctioneer cannot, without express authority, delegate \*the sale to another;(d) nor can he, after the sale, vary the terms of the contract.(e)

Unless especially authorized, he has no power to receive more than the deposit: and if, as respects the deposit or any other part of the purchase-money which he is authorized to receive, he allow the purchaser to retain it, on his personal or any other security, he does so at his own risk.(f)[1]

Holds deposit as stakeholder: interpleader.

Allowed his charges out of deposit in suit for specific performance.

Until the purchase is completed he is a stakeholder of the deposit, and should not part with it except by consent of both vendor and purchaser;(g) if both claim it, he may file a bill of interpleader;(h) but, in so doing, he must not claim to retain his commission out of it;(i) if, however, he be made a defendant to a bill for specific performance, and the deposit be brought into court, he will be allowed to deduct his charges and expenses, subject to the question as to who shall ultimately bear them.(j)[2]

(c) Sug. 50; *Franklyn v. Lamond*, 4 C. B. 637.

(d) Sug. 13; *Henderson v. Barnewell*, 1 Y. & J. 387.

(e) See *Blackburn v. Scoles*, 2 Camp. 343.

(f) Sug. 46.

(g) See *Smith v. Jackson*, 1 Madd. 620; and see *Wiggins v. Lord*, 4 Beav. 30, where the deposit was received by the vendor's solicitor.

(h) *Fairbrother v. Prattent*, Dan. 64.

(i) *Mitchell v. Hayne*, 2 Sim. & St. 63; and see *Bignold v. Audland*, 11 Sim. 28.

(j) *Annesley v. Muggridge*, 1 Madd. 593; *Yates v. Farebrother*, 4 Madd. 239.

[2] There being no principal who is responsible, the auctioneer is necessarily answerable as principal, otherwise the purchaser would have no remedy.

A person who gives a note in the name of another, as his attorney, without any authority for that purpose, is personally liable on the note to the party who accepts the note, under such mistake or imposition. *Dusenbury v. Ellis*, 3 John. Cas. 70.

[1] An auctioneer cannot, by conducting a sale by auction, deviate from the strict terms of the conditions; if he does, he will be personally amenable for all the consequences of his so doing. Stephen's *Nisi Prius*, vol. 1, p. 506.

[2] In a case where the auctioneer was also the attorney of the seller,



At law, the costs of an auctioneer who has paid the deposit into court under an interpleader order, have been allowed out of the deposit, leaving the purchaser to his remedy over against the vendor, although known to be insolvent (*k*)

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Allowed costs out of, at law.

After the purchase is completed, or before, with the consent of the purchaser, the auctioneer may, except in very special cases, safely pay the deposit to the vendor, although in embarrassed circumstances ;(*l*) if the purchase go off, the purchaser may recover the deposit from the auctioneer in an action at law :(*m*) but cannot claim interest, although the auctioneer may actually have made a profit upon it.(*n*)

May pay deposit to vendor after completion.

[\*82]

Is liable to action for, by purchaser, if contract rescinded.

The amount of his remuneration, unless (as it should be) settled by agreement, depends upon custom ; an agreement that he shall receive nothing if there be no sale, will not deprive him of his commission, if, after he has taken the

His commission, if estate sold by private contract.

(*k*) *Pitchers v. Edney*, 4 Bing. N. C. 721 ; and see *Reeves v. Barrauld*, 7 Scott, 281.

(*l*) *White v. Bartlett*, 9 Bing. 378.

(*m*) *Burrough v. Skinner*, 5 Burr. 2639 ; *Maberley v. Robins*, 5 Taunt. 625.

(*n*) *Harrington v. Hoggart*, 1 Barn. & Ad. 577.

and paid over the money to the seller, after he knew that objections to the title had been raised, an action against him for the deposit was sustained, but the judge cautiously abstained from pointing out the duty of an auctioneer in any other case. In a later case, where the auctioneer had paid over the deposit to the vendor, without any notice from the purchaser not to do so, and before any defect of title was discovered, it was held that the purchaser (the title being defective) might recover the deposit from the auctioneer. For the payment of the deposit depends upon the want of a good title being made out. If a good title is not made out, the purchaser becomes entitled to his deposit ; and, in strictness, an action may be maintained for it, without giving notice of the default to the auctioneer. See Sug. on Vend. vol. 1, p. 55.

If both the parties claim the deposit the auctioneer may file a bill of interpleader and pray for an injunction, which will be granted, upon payment into court of the deposit. But an auctioneer cannot maintain a bill of interpleader, if he insist upon retaining out of the deposit either his commission or the auction duty, for interpleader is where the plaintiff is the holder of a stake, which is equally contested by the defendants, as to which the plaintiff is wholly indifferent between the parties, and the right to which the plaintiff will be fully settled, by interpleader between the defendants. *Ib.*

## Chapter V.

usual steps preparatory to a sale, the estate be sold by the owner by private contract :(*o*) but where an agent was to receive 100*l.* for commission, "one third down and the remaining two thirds when the abstract of conveyances is drawn out," and an abstract of title was delivered, but the contract then went off, he was not allowed to recover from his principal the two-thirds which remained unpaid. (*p*)

Claim to,  
defeated by  
negligence.

Trustee  
acting as  
auctioneer  
has no com-  
mission.

If auctioneer  
insolvent,  
loss falls on  
vendor.

And the auctioneer's (or agent's) claim to remuneration will be defeated by any negligence on his part, as to the mode of conducting the sale or otherwise, whereby the sale is defeated :(*q*) and an executor or trustee acting as auctioneer in the sale of the trust property cannot charge commission. (*r*)

As a general rule, any loss occasioned by his insolvency or *mala fides* falls on the vendor as his employer :(*s*) but a fiduciary vendor will not be personally responsible for such loss, if he have acted prudently and under proper advice in the matter. (*t*) [1]

[\*83]

is agent for  
both parties  
within the  
Statute of  
Frauds.

Revocation  
of his autho-

The auctioneer is, as is also his clerk, (*u*) the agent of \*both vendor and purchaser within the meaning of the 4th section of the Statute of Frauds; and, as such, can bind them by entries in the sale book; (*v*) and, as respects the purchaser, the rule seems to be the same although he bid by an agent; (*w*) it appears, however, to be doubtful,

(*o*) *Rainy v. Vernon*, 9 Car. & P. 559; *Driver v. Cholmondeley*, *ibid.* n.

(*p*) *Alder v. Boyle*, 11 Jur. 591.

(*q*) *Jones v. Nanney*, 13 Pri. 76.

(*r*) *Kirkman v. Booth*, 11 Beav. 273.

(*s*) See Sug. 50, and cases there cited.

(*t*) *Edmonds v. Peake*, 7 Beav. 239.

(*u*) *Bird v. Boulter*, 1 Nev. & M. 313; *Henderson v. Barnewall*, 1 Y. & J. 387.

(*v*) *Emmerson v. Heelis*, 2 Taunt. 38; *Kemeys v. Proctor*, 1 Jac. & W. 350.

(*w*) *Emmerson v. Heelis*, 2 Taunt. 38.

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[1] In a case where 1000*l.* was paid, as a deposit, to an auctioneer, according to the conditions of sale, and the vendor opposed two motions by the purchaser, in an original and cross-cause filed concerning the contract, for payment of the deposit into court, and the auctioneer became a bankrupt, the loss was holden to fall on the vendor, although the second motion had succeeded and the day named for the payment of the money into court, was subsequent to the bankruptcy. See Sug. on Vend., p. 56.

whether either party will be bound who, after the lot is knocked down but before the entry is made, revokes the auctioneer's implied authority : (x) so inconvenient a doctrine the courts would, doubtless, repudiate, if possible. [1]

Chapter V.

rity after lot sold, before entry of name.

But the auctioneer's authority may be revoked by the vendor at any time before the sale ; and such revocation has been held valid against parties purchasing in ignorance of it. (y)

Revocation of authority before sale binds purchaser without notice.

It seems to be doubtful whether he can sue a party for whom he personally signs as agent ; (z) but he can maintain the action when the entry has been made by his clerk on behalf of the defendant. (a)

His right to sue party for whom he acts as agent.

(x) See *Blagden v. Bradbear*, 12 Ves. 466; *Mason v. Armitage*, 13 Ves. 25; *Malins v. Freeman*, 2 Keen, 25; Sug. 131.

(y) *Manser v. Back*, 6 Ha. 443; *sed aliter*, if the auctioneer had a written authority, and parties bid upon the faith of it; *vide infra*.

(z) *Farbrother v. Simmons*, 5 B. & Ald. 333; *Wright v. Dannah*, 2 Camp. 203.

(a) *Bird v. Boulter*, 1 Nev. & M. 313.

[1] "It has been made a question," says Chancellor Kent, "how far auction sales are within the provisions of the statute of frauds; but it is now understood to be settled, that they are within the statute, and that the auctioneer is the agent of both parties, and lawfully authorized by the purchaser, either of lands or goods, to sign the contract of sale for him as the highest bidder. The writing his name as the highest bidder in the memorandum of the sale by the auctioneer, immediately on receiving his bid, and knocking down the hammer, is a sufficient signing of the contract within the statute of frauds so as to bind the purchaser. Entering the name of the buyer, by the auctioneer in his book, is just the same thing as if the buyer had written his own name. The purchaser who bids, and announces his bid to the auctioneer, gives the auctioneer authority to write down his name, and the authority to the agent need not be in writing. There is no difference in the construction of the fourth and seventeenth sections of the statute of frauds of 29 Car. 2, c. 2, as to what is a sufficient signing of the contract by the party to be charged. The English law, as originally suggested, has been repeatedly recognized and considered, as the established doctrine in respect to auction sales of lands and chattels, by the English and American courts." 2 Kent's Com. 539, 540. See N. Y. Rev. Stat. vol. 2, p. 135, 136, secs. 2, 3; *McComb v. Wright*, 4 Johns. Ch. Rep. 659; *Cleaves v. Foss*, 4 Greenleaf's Rep. 1; *Alna v. Plummel*, 4 Greenleaf, 258; *Hicks v. Whitmore*, 12 Wendell's Rep. 513; *Baptist Church of Ilkica v. Bigelow*, 16 Wendell, 28.

## Chapter V.

(3.) *As to Agents.*

Agent. An agent, either for purchase(b) or sale(c) of an estate, may, unless the principal be a corporation,(d) be appointed by word of mouth; but a verbal appointment, of course, is \*generally inexpedient: neither of the contracting parties can, it appears, act as agent for the other. (dd)[1]

How may be appointed.

[\*84]

Private instructions to.

Where the agent has a written authority, parties dealing with him upon the faith of it are unaffected by private restrictions imposed upon him by his principal, but of which they have no notice.(e)[2]

(b) Sug. 130.

(c) Sug. 131.

• (d) *Corporation of Ludlow v. Charlton*, 6 Mee. & W. 815; *Cope v. Thames Haven Company*, 3 Exch. 841; 6 Rail. Ca. 83.

(dd) *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 Barn. & Ald. 333.

(e) *Neeld v. Duke of Beaufort*, 5 Jur. 1123; see, as to restrictions on an auctioneer, *Manser v. Back*, 6 Hare, 443.

[1] The statute of frauds does not require that the authority of the agent contracting even for the sale of lands should be in writing. But if an agent is to convey or complete the conveyance of real estate, or any interests in land, or to make livery of seisin, the appointment must be in writing; and where the conveyance or any act is required to be by deed, the authority to the attorney to execute it, must be commensurate in point of solemnity, and be by deed also. (2 Kent. Com. 614.) See *Cooper v. Rankin*, 5 Binney's Rep. 613; *Plummer v. Russell*, 2 Bibb's Rep. 174; 5 Mass. Rep. 40; *Shamburger v. Kennedy*, 1 Badg. & Dev. Rep. 1; 2 Greenl. Rep. 260; *Blood v. Goodrich*, 9 Wendell's Rep. 68; *Delins v. Cawthorn*, 2 Dev. N. C. Rep. 90; *Ib.* 153; 6 Serg. & Rawle, 331; *Davenport v. Sleight*, 2 Dev. & Battle, 381; Paley on Agency, 158-160.

[2] If A. authorizes B. to buy an estate for him at fifty dollars per acre and he gives fifty-one dollars per acre, A. is not bound to pay that price; but the better opinion is, that if B. offers to pay the excess out of his own pocket, A. is then bound to take the estate. "This case," says Kent, "is stated in the civil law, and the most equitable conclusion among the civilians is, that A. is bound to take the estate at the price he prescribed." If however, the agent does a different business from that he was authorized to do, the principal is not bound, though it might even be more advantageous to him; as if he was instructed to buy such a house of A., and he purchased the adjoining house of B., at a better bargain; or if he was instructed to have the ship of his correspondent insured, and he insured the cargo. In cases like these, the principal would not be bound, because the agent departed from the subject-matter of the instruction. See 2 Kent Com. 618, 619.

Also, a person may so deal with third parties, as to warrant them in the belief that another is his agent ; and he will, in equity, be bound by an unauthorized agreement of the agent which he (the principal) has given them reason to consider authorized. (f)

Chapter V.

Apparent agent.

An agent, employed to bid for an estate, and not limited as to price, can bind his principal to any amount ; if, being limited, he exceed the limit, and his want of authority be unknown to the other party, he himself is bound, (g) and his principal is said to be free : (h) but the production of written instructions authorizing him to give a certain price, does not preclude parol evidence of his having had a general discretionary power. (i) [3]

For purchaser, how far he can bind his principal.

As between the vendor and an alleged agent for purchase, but whose authority is denied, the agent has all the rights and liabilities of a principal ; the fact of agency, if denied, may, of course, if practicable, be established, by

Agency, if denied, may be established.

(f) See *Smith v. East India Company*, 16 Sim. 76.

(g) See *Jones v. Downman*, 4 Ad. & E., N. S. 235, n.

(h) *Hicks v. Hankin*, 4 Esp. Ca. 114 ; Amb. 498 ; 10 Ves. 400 ; Sug. 46 ; *Quere*, however, whether the rule should not be, that where the agent exceeds the limit, the principal shall be bound to the extent of such limit ; provided, in the case of an auction, that it exceed the amount of the last adverse bidding.

(i) *Hicks v. Hankin*, 4 Esp. Ca. see p. 116.

[3] The acts of a general agent will bind his principal, so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions. But an agent constituted for a particular purpose, and under a limited power, cannot bind his principal, if he exceeds that power. Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limits of his power, though if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power. "The principle that pervades the distinction on this subject," says Kent, "rests on sound and elevated morality. There must be no deception anywhere. The principal is bound by the acts of his agent, if he clothe him with powers calculated to induce innocent third persons to believe the agent had due authority to act in the given case. On the other hand, if there be no authority, nor the show or color of authority, from the principal, to do an act beyond his powers, the party who deals with the agent in any such transaction, must look to the agent only." 2 Kent, 620, 621.

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[\*85]

Contract by agent, assuming to be principal, enforced.

By nominal agent, when enforced.

Agreements by agent, how to be signed.

Agent, when personally liable.

[\*86]

Agent of un-

the agent against the principal, the principal against the agent, (j) or the vendor against the principal.

\*There is not, as a general rule, any objection to a contract for purchase entered into in the name of an agent, upon the ground of his having professed to deal on his own account; (k) but in the converse case of a purchaser professing to contract as agent for another, equity would refuse specific performance against the vendor, if it appeared that the name of the assumed principal was used as an inducement to a bargain which would not otherwise have been entered into. (l)

An agreement entered into by an attorney or agent, should, in order to avoid any question as to personal liability, be made and signed, by him, as attorney or agent, in the name of the principal; (m) in fact, if a person by deed covenant for himself and his heirs for the acts of another, he is personally liable, although described as agent; (n) it has, however, been held, in a recent case, that if a person enter into a contract in writing, describing himself as agent and naming his principal, he is not personally liable unless he had no authority to make the contract, or, in making it, exceeded his authority; (o) and even where a person, without authority, signs an instrument in the name of and as agent for another, he cannot be treated as a party to such instrument, and be sued upon it, unless he be shown to have been really the principal; although he may probably be liable in an action for damages for the misrepresentation: (p) where the agent of the vendor, at the purchaser's request, signed the agreement in his (the agent's) own name, this was held not to bind the purchaser. (q)

\*After the contract is entered into, an agent for sale, if

(j) *Taylor v. Salmon*, 4 Myl. & Cr. 134.

(k) Sug. 242; *Nelthorpe v. Holgate*, 1 Coll. 203.

(l) *Phillips v. Duke of Bucks*, 1 Vern. 227; and see other cases cited in Sug. 244; and see Ch. XVIII. *infra*.

(m) Sug. 53.

(n) See *Appleton v. Binks*, 5 East, 148; and cases cited, Sug. 53.

(o) *Downman v. Jones* (in error,) 9 Jur. 454, Ex. Ch.

(p) *Jenkins v. Hutchinson*, 13 Jur. 763, Q. B.

(q) *Graham v. Musson*, 5 Bing. N. C. 603.

and so long as his principal's name is undisclosed, may vary the terms of payment ;(r) he cannot, without special authority, receive the purchase-money ;(s) if authorized to receive it, a direction from his principal to pay it to a third party, is irrevocable, if given for valuable consideration.(t)

If an agent for sale is to receive for commission a percentage on the sum obtained, he cannot claim it in respect of any part of the purchase-money which remains unpaid : (u) unless such nonpayment be occasioned by the wilful act or default of the vendor : (v) if several agents are employed, and one find and another conclude the bargain with a purchaser, each may claim a commission ; but not the usual commission, viz., *2l. per cent.* (w)

The authority of an agent, either for sale or purchase, may be revoked at any time before he has entered into a binding agreement ; (x) [1] if he act without authority, his alleged principal, even although he have had no previous communication with him, or were ignorant of his name as

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disclosed principal may vary terms of payment. Cannot receive purchase-money without authority.

Order upon, to pay purchase money to a third person.

Commission.

Authority may be revoked ;

or unauthorized act, adopted.

(r) Sug. 47 ; *Blackburn v. Scholes*, 2 Camp. 343.

(s) *Mynn v. Jolliffe*, 1 Moo. & R. 326 ; and see further, *infra*, Ch. XIII. as to payment to agents.

(t) *Metcalf v. Clough*, 2 Man. & Ry. 178.

(u) *Bull v. Price*, 7 Bing. 237.

(v) S. C., see p. 241.

(w) *Murray v. Currie*, 7 Car. & P. 584.

(x) *Farmer v. Robinson*, 2 Camp. 339, n. ; *Manser v. Back*, 6 Ha. 443 ; *Smart v. Sandars*, 3 C. B. 390.

[1] The authority of the agent is, in general, from the nature of it, revocable at the pleasure of the party who gave it. In the case of a lawful revocation, by the act of the principal, it is requisite that notice be given to the agent ; and all acts *bona fide* done by him under the authority, prior to the notice of the revocation, are binding upon the principal. It seems, if the notice had reached the agent, and he concealed the knowledge of the revocation from the public, and the circumstances attending the revocation were such that the public had no just ground to presume a revocation, his acts, done under his former power, would still be binding upon his principal. And it has been even said that he can conclude a transaction which was not entire, but partly executed under the power, when the notice of the revocation was received, and bind the principal by those acts which were required to consummate the business. See 2 Kent Com. 644, and authorities.

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[\*87]

But not by  
any other  
than the  
nominal  
principal.]

Clerk of  
agent cannot  
bind princi-  
pal.

the date of the contract, may adopt his acts:(y) nor is it necessary that the principal should be competent to contract at the date of the agreement; for instance, an administration may adopt a contract entered into before the grant of the letters of administration:(z) but a contract \*entered into by A., expressly as agent for B., cannot be adopted by C.(a)

The clerk of an agent for sale has, it appears, no implied authority to bind the principal.(b)

(4.) *As to the deposit.*

Deposit is a  
part pay-  
ment.

Purchaser  
cannot elect  
to forfeit it.

To whom  
and how it  
should be  
paid.

The deposit is a payment in part of the purchase-money;(c) and the purchaser cannot elect to forfeit it and avoid the agreement.(d)

Even the deposit should not be paid to a mere agent for sale, without express authority from the vendor; if the authority be for the agent to receive it at a particular time, or in a particular manner, of course it cannot be safely paid at any other time, or in any other manner;(e) the purchaser, however, will not be liable for loss arising from his having followed any such special authority as to the mode of payment.(f)

Not to be  
paid by set-  
tlement of  
accounts  
with agent,  
except under  
special cir-  
cumstances;

The deposit cannot safely be paid by the purchaser by being set off in account with the auctioneer or agent, except under the special circumstances of his being able to show the existence of a debt of equal amount due from the vendor to the auctioneer or agent, and that the latter was authorized by the vendor to retain the deposit on account of such debt;(g) so, if, instead of making a cash

(y) *Maclean v. Dunn*, 4 Bing. 722; and see *De Beil v. Thomson*, 3 Beav. 469; *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 57; and *Wilson v. Tummon*, 6 Sc. N. R. 894.

(z) *Foster v. Bales*, 12 Man. & W. 226.

(a) *Wilson v. Tummon*, 6 Man. & Gr. 236; 6 Sc. N. R. 894.

(b) *Coles v. Trecothick*, 9 Ves. 234.

(c) Sug. 48.

(d) 2 Mer. 506.

(e) See *Young v. Guy*, 8 Beav. 149.

(f) Sug. 47.

(g) *Barker v. Greenwood*, 2 Y. & C., Ex. 414; *Young v. White*, 7 Beav. 506; *Hanley v. Cassan*, 11 Jur. 1088.



payment, the purchaser give his acceptance, payment of the bill when due is no defence to an action by the vendor if the bill never came into his possession. *(h)*

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nor by ac-  
ceptance.

\*If a cheque be given for the deposit, an action on the cheque may be resisted upon any ground which would have enabled the purchaser to recover at law the deposit, if actually paid. *(i)*

[\*88]  
Cheque for,  
when void.

If a purchaser become entitled to a return of his deposit, he can, in the absence of special agreement, claim the specific sum paid, with interest; and will not be prejudiced or advantaged by any fall or rise in any securities in which it may have been invested; unless such investment were made with his assent, (which will not be assumed from his making no reply to notice of the investment, *(j)* or, (in the case of a bill being filed for specific performance,) under the authority of the court; in which cases the investment will be at his risk and for his benefit: *(k)* and the same rules apply to an investment of the purchase-money by the purchaser, pending discussions as to title, &c. *[1]*

Purchaser  
not bound by  
investment  
of, except in  
special cases

Equity will, in general, relieve the purchaser against forfeiture of his deposit, if he be able and willing to give to the vendor the full benefit of the contract: *(l)* its return, with interest, may be directed even in a suit for specific performance, where the bill is dismissed, if the vendor be

Forfeiture of  
when reliev-  
ed against.

- (h)* *Sykes v. Giles*, 5 Mee. & W. 645.
- (i)* *Mills v. Oddy*, 6 Car. & P. 728.
- (j)* See *Roberts v. Massey*, 13 Ves. 561.
- (k)* See *Poole v. Rudd*, 3 Bro. C. C. 49; Sug. 50, 51.
- (l)* Sug. 51; *Moss v. Matthews*, 3 Ves. 279.

[1] It has been observed, that a deposit does not impose a liability or responsibility upon the party to whom notice of it is given; throwing upon him any risk as to the principal. The principal remains entirely at the risk of the party making the deposit. He cannot, by depositing the money with his bankers, throw the risk of their credit upon the other parties. They are not called upon to express their opinion of that bank, or to say anything. 2 Mad. 28.

Where the deposit is considerable, and it is probable that the purchase may not be completed for a long time, it would be well for the parties to enter into some arrangement for the investment of the deposit.

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plaintiff; but not if the purchaser be plaintiff; *(m)* nor, where the vendor is plaintiff, if the bill be dismissed without any decision upon the question of title, but for *laches*, or on some other collateral ground. *(n)*

May be retained by vendor, if purchaser die without heir; *semble*.  
[\*89]  
Loss of, by insolvency of auctioneer.

If the purchaser die before obtaining a conveyance, intestate and without an heir, it seems probable that the vendor might retain both the estate and the deposit. *(o)*

\*As a general rule, if the deposit be lost through the insolvency of the auctioneer, the loss falls on the vendor. *(p)* [1]

(5.) *As to puffers and reserved biddings.*

Puffers.  
One bidder allowed in equity for protection, unless the sale is without reserve.

Unless the property be expressly or impliedly offered for sale without reserve, *(q)* it appears settled that the employment of a bidder to prevent its going at an undervalue is allowable in equity; *(r)* but the rule is not so extended as to authorize the employment of more bidders than one, even although they are limited to the same sum; *(s)* nor even of a single bidder for the purpose of enhancing the price indefinitely; *(t)* but, on a sale in lots, several bidders might, it is conceived, be employed for different parts of the property, provided that no lot were protected by more than one bidder: at law, the rule as respects the employment of a single bidder seems unsettled; Sir *Edward Sugden* seems to consider that the authorities preponderate in favor of the practice; *(u)* however, in a very recent

Rule different at law; *semble*.

*(m)* Sug. 51; see *Williams v. Edwards*, 2 Sim. 78; see also *Gee v. Pearce*, D. G. & S. 325.

*(x)* *Southcomb v. Bishop of Exeter*, 6 Ha. 225, 228.

*(o)* Sug. 337.

*(p)* *Supra*, p. 82.

*(q)* *Meadows v. Tanner*, 5 Madd. 34; *Robinson v. Wall*, 2 Phill. 372; and see *Thornett v. Haines*, 15 Mees. & W. 367.

*(r)* *Woodward v. Millar*, 2 Coll. 279; and see Sug. 15, 16; and earlier cases there cited.

*(s)* *Wheeler v. Collier*, 1 Mood. & Malk. 123; and see 15 Mees. & W. 372; and Sug. 17.

*(t)* 12 Ves. 483.

*(u)* Sug. 16.

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[1] Upon the principle that the auctioneer is more properly the agent of the vendor.

case, the Court of Exchequer maintained the contrary doctrine, and laid down broadly that the employment of a single bidder to protect the property would vitiate the sale at law, unless the intention to do so were expressly notified: but this opinion was extra-judicial; the sale, (in the case before the court,) having been advertised as to be made without reserve.(v)

Equity, in fact, seems to favor the employment of a \*person to protect the property; for, it has refused to enforce specific performance against a vendor, in the several cases of his known agent having bid for the purchaser and been mistaken for a puffer,(w) and of the person actually employed to bid for the vendor having neglected so to do:(x) so, in a converse case, where, upon a sale of estates belonging to several vendors, the person employed to protect one estate, by mistake purchased another, the bill against him for specific performance was dismissed.(y)[1]

Purchaser  
by mistake,  
specified per-  
formance not  
enforced  
against.

[\*90]

(v) *Thornett v. Haines*, 15 Mees. & W., see pp. 371, 372; and see *Wheeler v. Collier*, 1 Mood. & Malk. 123.

(w) *Twining v. Morrice*, 2 Bro. C. C. 326.

(x) *Mason v. Armitage*, 13 Ves. 25.

(y) *Malins v. Freeman*, 2 Kee. 25.

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[1] See 2 Kent Com. 537.

## \*CHAPTER VI.

## AS TO THE AGREEMENT.

1. *As to the general necessity for a written agreement.*
2. *The preparation of formal agreements.*
3. *What informal documents may constitute an agreement.*
4. *The signature.*
5. *The stamps.*
6. *As to illegal agreements.*

Written agreement generally necessary under statute of frauds.

What sales not within the statute.

(1.) UNDER the statute of frauds,(a) a written agreement, signed by the party to be charged, or his agent, is generally necessary to the validity of any contract for the sale or purchase of lands, tenements, or hereditaments, or any estate or interest in or concerning them; whether such estate or interest be subsisting, or be proposed to be created *de novo*: and the act extends to sales by auction,(b) and in bankruptcy;(c) but not to sales before a master, or to purchases under the order of the court, if the owner of the estate make no opposition to the confirmation of the report approving of the purchase.(d)[1]

(a) 29 Car. II. c. 3, see s. 4; Sug. 98.

(b) Sug. 135; see *Attorney General v. Day*, 1 Ves. 218; and 12 Ves. 472.

(c) *Ex parte Cutts*, 3 Dea. 267; Lord *Cottenham*.

(d) See note.(b)

[1] The statute of frauds has been either expressly adopted, or assumed as law throughout the United States. In New York, it is made to apply, not only to every estate and interest in lands, but to every trust or power concerning the same; and the exception as to leases is confined to leases for a term not exceeding one year. The provision does not apply to trusts by implication, or operation of law. And a parol promise to pay for the improvements made upon land, within the statute—they not being an interest in land, but only another name for work and labor bestowed upon it. See N. Y. Rev. Stat., vol. 2, p. 134, 137, secs. 6, 7, 8; *Frear v. Hard- enburgh*, 5 Johns. Rep. 272; *Lower v. Winter*, 7 Cowen's Rep. 263.

With regard to the agreement in writing required by the statute, no precise form is necessary. It must, however, contain all the terms of the

And although an actual demise by parol for any term not exceeding three years, at a rent not less than two-thirds of the improved value, is valid under the 2nd section of the statute, an executory agreement for such a demise \*is void unless in writing :<sup>(e)</sup> so, a parol agreement by a lessee for an assignment of the residue of his term (being less than three years,) is void, and cannot, it would seem, operate as an underlease.<sup>(f)</sup>

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Parol executory agreement for lease,

[\*92]

or for assignment of term less than three years void.

The first section of the act, which renders a writing necessary for the creation of "all leases, estates, interests of freehold, or terms of years, or any uncertain interest, of, in or out of any lands, &c.," has been held not to extend to a license; *e. g.*, a license to A., in consideration of a yearly payment, to stack coals on a piece of ground for seven years, with the sole use of the land so employed :<sup>(g)</sup> this decision, however, Sir *E. Sugden* observes,<sup>(h)</sup> appears to be in the very teeth of the statute; and, although it has been often followed,<sup>(i)</sup> its authority seems to be destroyed by subsequent cases which decide that an ease-  
Whether parol license is valid.  
*Semble, not.*

(e) Sug. 95.

(f) *Barrett v. Rolph*, 14 Mee. & W. 348.

(g) *Wood v. Lake*, Say. 3.

(h) Sug. 97.

(i) *Ibid.*

contract, distinctly set forth, and be made with the privity and consent of all the contracting parties. It need not be contained in a single document. It must, however, all be collected from the writings, verbal testimony not being admissible to supply any defects or omissions in the written evidence. And all the contemporaneous writings between the original parties, relating to the same subject matter, are admissible in evidence. See *Cruise on Real Property*, vol. 4, p. 33.

The agreement must contain everything necessary to show the contract between the parties, so that there be no need of parol proof to explain the intention of the parties, or the terms of the agreement. Where, therefore, a pew in a church was sold at auction, and the only memorandum of the sale was an entry made by the auctioneer on a chart or plan of the ground floor of the church, exhibited at the auction, of the name of the purchaser, and of the sum bid by him, it was held that the memorandum was not sufficient within the statute; although, at the time of the auction, a written or printed advertisement, containing the conditions of sale, was exhibited and read to the purchasers. *Trustees of B. Church of Ilkica v. Bigelow*, 16 Wend. Rep. 28. See *Parkhurst v. Van Cortland*, 1 John. Ch. Rep. 280, 281; *Abeel v. Radcliff*, 13 Johns. Rep. 297; 2 Kent Com. 510.

Chapter VI. ment cannot be granted without deed ;(j) it is also conceived that a parol executory agreement for such a license would probably be invalid ; the words, "in or concerning," in the 4th section, being, apparently, more comprehensive than the words, "of, in, or out of," in the 1st section.

Any agreement substantially for a sale, is within the statute.

[\*93]

Any arrangement which is substantially, although not professedly, a sale of an interest in land, is within the 4th section, and requires a written contract: *e. g.*, an agreement by a person possessed of a term for years, to give up possession to another, and allow him to become tenant for the remainder of the term, in consideration of his paying in part for certain repairs ;(k) or an agreement by the termor to quit possession on a certain day, and pay all outgoings up to that time, in consideration of a sum of money to be paid to him by a party who has agreed with the landlord \*for a lease of the premises on the termination of the subsisting term ;(l) or an agreement by a termor, under similar circumstances, that he will part with the land, and that the intended lessee shall take it.(l)[1]

So, a parol agreement by A. with an occupying tenant to pay him £100, upon the tenant surrendering his lease, and procuring the landlord to accept A. as tenant, is void :(m) nor can the tenant sue for the consideration, upon the contract, although he have performed his part

(j) See 1 Jarm. Conv. by S. 289, and cases there cited ; and, in particular, *Bird v. Higginson*, 4 Nev. & M. 505.

(k) *Buttmer v. Hayes*, 3 Jur. 704.

(l) *Smith v. Tynbs*, 3 Jur. 72.

(m) *Cocking v. Ward*, 1 C. B. R. 858.

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[1] A parol agreement, between a landlord and a tenant of a term for six years, that the tenant shall surrender his interest in the demised premises, and that the landlord shall execute a new lease for eight years to third persons, does not operate as a surrender by operation of law, unless such new lease be executed and pass an interest according to the contract and intention of the parties ; although the tenant quits the premises, the third persons enter, remain in possession for the space of a year, and pay rent to the landlord, and consequently, the original lease remains in force, and the landlord may maintain an action upon the covenant in it, for the payment of rent against the original tenant, for rent subsequently accrued. *Schiefflin v. Carpenter*, 15 Wen. Rep. 400.

of it; but he may sue upon an account stated, if, after such performance, A. have admitted that he is indebted to him in the amount of the consideration.<sup>(m)</sup> Chapter VI.

An agreement void under the 4th section, may, until countermanded, operate as a license, so as to excuse what would otherwise be trespass.<sup>(n)</sup> Void agreement may as a license excuse trespass.

And the transfer in writing of a parol, and therefore void, agreement for purchase of an estate, will be a good consideration as between transferor and transferee, if the latter actually obtain a conveyance from the vendor;<sup>(o)</sup> so, also, if an agent for purchase enter into a parol agreement, and pay the purchase-money, and procure a conveyance, he can sue his principal for the amount.<sup>(p)</sup> Written transfer of parol agreement.

The 4th section has been held to extend to agreements for sale of shares in a mining company;<sup>(q)</sup> but not of shares in a railway company; at least if the act of incorporation makes them personal estate.<sup>(r)</sup> Mining but not railway shares within the 4th sect.

Questions frequently arise as to the necessity for a written agreement for the sale of growing crops; the law upon the subject can hardly be considered as settled;<sup>(s)</sup> [1] Sale of growing crops.  
 \*but the following appears to be the general result of the authorities. [\*94]

(m) *Cocking v. Ward*, 1 C. B. R. 858.

(n) *Carrington v. Roots*, 2 Mee. & W. 248.

(o) *Seaman v. Price*, 1 Ry. & Moo. 195.

(p) *Paule v. Gunn*, 4 Bing. N. S. 445.

(q) *Boyce v. Greene*, Batty, 608.

(r) *Bradley v. Holdsworth*, 3 Mee & W. 422; *Duncuft v. Albrecht*, 12 Sim. 189; Aff. 199.

(s) Sug. 101.

[1] In the case of *Frear v. Hardenbergh*, 5 Johns. Rep. 276, it was held that the annual produce of land which was proceeding to a state of maturity, and which when taken at maturity, would be severed from the ground, and would become movable goods, was not an interest in land within the fourth section of the statute of frauds; and it was observed that the statute had in view some interest to be acquired in the land itself by the contract, and not such as was collateral, and by which no kind of interest was to be gained in the land.

The rule would seem to be that if the subject matter of the contract was not to be severed and delivered by the vendor as a chattel, but was a right in the soil to grow and bring the same to maturity, and a right of entry to cut and take it as a part of the contract the case falls within the fourth section of the statute of frauds.

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The point to be determined in such cases is, whether the interest contracted for be an interest in land within the meaning of the 4th section of the statute of frauds—in which case a written agreement is necessary—or whether the contract be merely for the sale of chattels; in which case, however, unless the price be under £10, there must, under the 17th section, be a written agreement or memorandum, or part payment of the price, or part acceptance of the goods.

Cases within  
the 4th sect.

An agreement for sale of the exclusive right to the vesture of land, or for sale of crops which would not go as emblements to the executor,<sup>(t)</sup> as moving grass,<sup>(u)</sup> standing underwood, poles, or timber, is within the 4th section; nor, in the case of grass, does it appear to be material whether it is to be mowed or fed off by the purchaser; this is, if, in the latter case, he is to have the exclusive right to it :<sup>(v)</sup> so, also, an agreement for the sale of growing fruit, (*e. g.*, pears),<sup>(x)</sup> is within the 4th section.

Cases not  
within the  
4th sec.

But if the agreement be for sale of the crop after the seller shall have reduced it to a chattel by severance from the freehold, as where standing timber is to be felled by the vendor, the 4th section does not seem to apply :<sup>(y)</sup> and the same distinction would, it is conceived, exist in agreements for the sale of gravel,<sup>(z)</sup> stone, or other minerals : nor does the 4th section seem to affect sales of crops which would go as emblements :<sup>(a)</sup> such as hops,<sup>(b)</sup> \*wheat, potatoes, turnips, &c. : nor does it appear material in such cases whether the crop at the time of sale be mature or otherwise, or whether it is to be removed by the buyer or seller, or to be paid for by the quantity, or by the acre; and even in the case of grass, if the vendor retain possession of the land, and the right of turning on his

[\*95]

(t) See judgment in *Evans v. Roberts*, 5 B. & C. 829; Sug. 99.

(u) *Crosby v. Wadsworth*, 6 East, 602.

(v) See *Jones v. Flint*, 10 Ad. & E. 760.

(x) *Rodwell v. Phillips*, 9 Mee. & W. 501; *sed qu.* Whether so, if the crop is mature at the time of sale?

(y) *Smith v. Surman*, 9 B. & C. 561; and see 1 Crompt. & Mee. 105.

(z) See *Coulton v. Ambler*, 13 Mee. & W. 403.

(a) Sug. 100; but see *Waddington v. Bristow*, 2 Bos. & P. 452.

(b) *Evans v. Roberts*, 5 B. & C. 829; see judgment; and Sug. 99.



own cattle, and the purchaser have no right of severance, but only to feed it off along with the vendor, the agreement is merely for agistment, and is not within the 4th section: (w) but in none of these cases is it prudent to dispense with a written contract. Chapter VI

And a parol agreement, for the sale of growing crops, which would otherwise be void under the 4th section, may be good as between outgoing and incoming tenants: (x) but where a farm is let by parol, a sale of the growing crops by the lessor to the incoming tenant, seems to require a written contract under the 4th section. (y)

And although an agreement be void under the 4th section, the seller, (except perhaps the parties be lessor and tenant,) can recover the value of the crop if it be taken or received by the purchaser: but he cannot recover on the terms of the agreement, but only on a *quantum meruit*. (z)

A sale of tenant's fixtures by the tenant to the landlord, has been held not to be within the 4th section, although they be sold while attached to the freehold. (a)

An agreement by a tenant to pay an increased sum by way of rent, in consideration of improvements to be made by the landlord, has been held not to be within the act; and therefore to be valid although by parol: (b) but a different rule has been laid down as respects an agreement for abatement of rent. (d)

If an agreement relating to the sale of land be void under the 4th section, it will also be void as respects any other matters which are either inseparably mixed up with, or are dependent upon, the principal agreement: *e. g.*: where a tenant agreed to rent a furnished house, and the landlord was to supply additional furniture after the tenant had taken possession, it was held that the want of a

(w) *Jones v. Flint*, 10 Ad. & E. 760.

(x) *Mayfield v. Wadsley*, 3 B. & C. 357; and see Sug. 100.

(y) *Lord Falmouth v. Thomas*, 1 Crompt. & Mees. 89.

(z) 1 Crompt. & Mees. 109.

(a) *Hallen v. Runder*, 1 Cr. M. & R. 266.

(b) *Donnellan v. Reade*, 3 B. & A. 899, 904; *Hoby v. Roebuck*, 7 Taunt. 157.

(d) *O'Connor v. Spaight*, 1 Sch. & Lef. 306.

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written contract was a bar to an action for non-delivery of the furniture;(e) so, upon a parol agreement to let a house, and to make certain repairs, which the tenant was to pay for, it was held that the landlord could not sue him for the cost of such repairs.(f)

(2.) *As to the preparation of formal agreements.*

As to formal agreements.

Upon formal agreements for sale, few questions arise distinguishable from those which have been already considered with reference to the particulars and conditions.

As to naming the representatives of the parties.

In framing such agreements, it is usual to make the parties agree, each "for himself, his heirs, executors, and administrators;" the insertion of the word "heirs," however, is scarcely correct, unless the instrument be under seal; and it is not necessary, although the general practice, to name the personal representatives.

Agreement, on sale by auction, refers to particulars, &c.

Upon a sale by auction, the agreement, of course, refers to, and is generally written or printed upon a copy of the particulars and conditions.

What to be comprised in agreement on sale by private contract.

[\*97]

Upon a sale by private contract, the agreement, as a general rule, comprises whatever stipulations and other \*matter would, had the sale been by auction, have been comprised within the particulars and conditions; except such matter as exclusively applies to an auction; when it is probable that special stipulations, as to title, &c. will be necessary, the agreement should be prepared in blank before the estate is offered for sale.

Matters to be provided for, in agreement for sale to public companies, &c.

In preparing agreements for the sale of land to promoters of public undertakings, care should be taken to state whether the purchase-money is to be in lieu of those accommodation works which the promoters are *prima facie* bound to make and maintain for the owners of adjoining land; and whether the ordinary or statutory rule as to the expenses of the purchaser is to operate:(g) the agreement for sale to a Railway or Waterworks Company,

(e) *Mechele v. Wallace*, 7 Ad. & E. 49.

(f) *Vaughan v. Hancock*, 10 Jur. 926; and see *Lord Falmouth v. Thomas*, 1 Cramp. & Mees. 89.

(g) See *Frend and Ware's Railway Conveyancing*, p. 146.

should, if such be the intention, expressly state that the mines and minerals are included in the purchase.<sup>(h)</sup> Chapter IV.

(3.) *As to what informal documents may constitute an agreement.*

Informal agreements give rise to questions of greater difficulty. Informal agreements.

We may lay down as general, although not universal rules, 1st, that any writing signed by the party to be charged, or his agent, and which, either expressly or by reference to other writings, determines the parties to and subject-matter of a contract, and fixes, or provides the compulsory means of fixing all its terms, is a sufficient agreement within the Statute; and, 2ndly, that no writing is a sufficient agreement, which fails in any of the above-mentioned particulars.<sup>[1]</sup> What may be a sufficient agreement within the statute.

(A) See 8 & 9 Vict. c. 20, sect. 77; and 10 & 11 Vict. c. 17, sect. 18.

[1] Whether an agreement for the sale of land, signed by one partner, in behalf of himself and his co-partners, would be valid agreement as against the purchaser, under the N. Y. statute of frauds which requires the contract to be signed by the party by whom the sale is to be made. *Quere?* *More v. Smedburgh*, 8 Paige, 600.

If a person, intending to convey lands, request a witness who is present to sign his name to the deed for him, which the witness does in his presence; *quere*, is the deed sufficiently executed under the statute of frauds to convey lands? *Wallace v. McCullough*, 1 Richardson's Eq. Rep. 436.

Supposing such a deed not to be sufficiently executed to convey the lands, then *quere*, can the person intending to convey subsequently assent, so as to make the deed binding on the parties? *Ib.*

In Massachusetts, by the statute of frauds, (Rev. Stat. 59, §29,) an oral license to erect and continue a mill dam on one's land, is of no legal validity as against a subsequent grantee of the land. *Stevens v. Stevens*, 11 Met. Rep. 251.

An oral promise, made by the mortgagee to the mortgagor's creditors, to relinquish his claim to the land mortgaged, if they will accept from the mortgagor another mortgage thereof, and give him time of payment, is inoperative and void by the statute of frauds; and though such creditors, on the faith of such promise, take a second mortgage, and give time of payment to the mortgagor, they acquire no right thereby, as against the first mortgagee. But such promise is presumptive evidence, (which may be rebutted,) that the first mortgage was not made bona fide. *Parker v. Barker*, 2 Met. Rep. 423.

Chapter VI.  
Letters.

Thus, letters are constantly held to constitute a binding contract ; and often where such a result is a surprise upon

A verbal agreement to purchase land at sheriff's sale, for the benefit of another, is void under the statute of frauds, and cannot be enforced against the purchaser. *Schmidt v. Gatewood*, 2 Richardson's Eq. Rep. 162.

Where an agent had agreed, by parol, to bid for his principal, at a sheriff's sale, for certain real estate, and who took the titles in his own name; the case will be taken out of the statute of frauds, by an account made out and signed by him, charging his principal with the purchase-money ; in which case, the agent was decreed to hold the estate in trust. *Denton v. McKenzie*, 1 Des. 289.

A receipt signed by the vendor in these words : " Received of A. twenty dollars, being on account of a plantation on the Cypress, sold to him this day for 2,200 dollars, payable in different instalments, as per agreement. Charleston, August 1, 1816," was held sufficient to take the case out of the statute of frauds. *Cosack v. Descoudres*, 1 McCord Rep. 425.

The memorandum of sale, to be effectual, must not only be signed by the party to be charged, but must contain the substantial terms of the contract, expressed with such certainty that they may be understood from the contract itself, or some other writing to which it refers, without resorting to parol evidence. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273 ; S. C., on appeal, 14 Johns. Rep. 15 ; *Abeel v. Radcliff*, 13 Johns. Rep. 297 ; *Guens v. Calder*, 2 Des. 188 ; *Parker v. Bodley*, 4 Bibb, 102 ; *Colson v. Thompson*, 2 Wheat. 336—341. See *Waterman's American Chancery Digest*, vol. 1, 259, 260. As to what contract for sale and purchase of land is sufficient in Virginia to charge vendee, see *Smith v. Jones*, 7 Leigh, 165.

Part performance of an agreement by parol, and, without writing, to sell land, will, in certain cases, in equity, take the agreement out of the statute of frauds. The agreement, to be enforced, must be clearly proved, and the acts of part performance must unequivocally appear to relate to the identical contract set up. What facts will amount to a part performance sufficient to justify the interference of chancery, depends upon circumstances. As a general rule, delivery of possession is part performance. So, also, the making of beneficial improvements on the land. Formerly, payment was considered part performance ; but it is now held, that payment of part, or even the whole of the purchase-money, is not of itself, and without something more, a part performance that will take the case out of the statute. See 2 Kent, 451 ; *King v. Bardeau*, 6 Johns. Ch. Rep. 38 ; *King v. Hamilton*, 4 Peters' U. S. Rep. 311 ; *Seymour v. Delancy*, 6 Johns. Ch. Rep. 222 ; *Benedict v. Lynch*, 1 John. Ch. Rep. 370 ; *Parkhurst v. Van Cortlandt*, 1 John. Ch. Rep. 273 ; S. C., 14 Johns. Rep. 15 ; *Keats v. Rector*, 1 Arkansas Rep. 391 ; 1 Hammond's Ohio Rep. 251 ; 1 Binney, 131 ; 3 Watts & Serg. 56 ; *Jerris v. Smith*, 1 Hoffman's Ch. Rep. 470 ; 2 Scam. Rep. 218 ; 2 Wharton Rep. 387 ; 6 Ohio Rep. 483 ; 9 Watts' Rep. 85 ; 6 Wharton, 153 ; 1 Watts & Serg. Rep. 383 ; 1 McMullan's S. C. Rep. 311 ; 1 Harrington's Del. Rep. 533 ; 8 Greenl. 320 ; 9 N. H. Rep. 385 ; 2 Watts' Penn. Rep. 148.

\*the writers :(i) and a letter addressed by either a vendor, or, it would appear, a purchaser, to a third person, with directions incidental to the carrying out of the agreement:—e. g., the delivery of title deeds, or preparation of the conveyance—may suffice to bind the writer :(k) so, the vendor's receipt for the purchase-money or deposit, or a similar receipt signed by the auctioneer, or the entry of sale made by him in his books,(l) or a bond of reference to a surveyor to settle the price to be paid by the purchaser, would, it appears, be sufficient.(m)[1]

Chapter VI.

Receipt for purchase money.

Entry of sale in auctioneer's book.

Arbitration bond.

(i) *Kennedy v. Lee*, 3 Mer. 441. "The same construction must be put upon a letter, that would be applied to the case of a more formal instrument; the only difference being, that a letter or correspondence is generally more loose and inaccurate in respect of terms, and creates a greater difficulty in arriving at a precise conclusion." *Per* Lord Eldon, *ibid.* 451; see *Thomas v. Blackman*, 1 Coll. 301.

(k) *Owen v. Thomas*, 3 Myl. & K. 353; *Rose v. Cunynghame*, 11 Ves. 550; Sug. 122.

(l) *Coles v. Trecothick*, 9 Ves. 234; *Blagden v. Bradbear*, 12 Ves. 466; Sug. 114, 121.

(m) *Per* Lord Rosslyn, 6 Ves. 17.

[1] If upon a treaty for sale of an estate, the owner write a letter to the person wishing to buy it, stating that if he parts with the estate, it shall be on such and such terms, specifying them; and such person, upon receipt of the letter, or within a reasonable time after the offer is made, accept the terms mentioned in it, the owner will be compelled to perform the contract *in specie*. So, if a man, being in company, makes offers of a bargain, and then write them down and sign them, and another person take them up, and prefer his bill, that will be a sufficient agreement to take the case out of the statute. But, if it appears that, on being submitted to any person for acceptance, he had hastily snatched it up, had refused the owner a copy of it; or if, from other circumstances, fraud in procuring it may be inferred, in case of an action, it will be left to the jury to say whether it was intended by the defendant, at first, to be a valid agreement on his part, or as only containing proposals in writing, subject to future revision; and if the aid of equity be sought, these circumstances would have equal weight with the court. So, in every case, it must be considered whether the note or correspondence import a concluded agreement; for if it amount merely to treaty, it will not sustain an action or suit. See Sug. on Vend. vol. 1, p. 117; *Atwood v. Cobb*, 10 Pick. Rep. 227; *Butterfield v. Hartshorn*, 7 N. H. Rep. 345; *Ellis v. Deadman*, 4 Bibb, 466; *Johnson v. Ronald's Adms.*, 4 Munf. 77.

In the case of a letter, the letter must sufficiently specify all the terms upon which the agreement is made, or refer to some written agreement in

## Chapter VI.

Notice by or  
to Railway  
companies,  
&c.

[\*99]

Statutory  
power not  
exhausted  
by single  
notice.

So, notice given by a Railway or other Public Company of their intention to exercise a power of compulsorily taking land, if given to a person under no personal incapacity, <sup>(n)</sup> constitutes a binding contract to the extent of fixing what land is to be taken, <sup>(o)</sup> and cannot be withdrawn by the company without the consent of the landowner; <sup>(p)</sup> and the price, if not settled by agreement, must be determined in the manner pointed out by the Act of Parliament; <sup>(q)</sup> but notice by a Company, under the \*Lands Clauses Consolidation Act, of their intention to take part only of premises used as a manufactory, does not amount to an agreement to take the whole, although under the 92nd section of the Act the owners may refuse to sell less than the whole: <sup>(q)</sup> it has been recently determined, that under the above Act, a Company may give a second notice to the same landowner in respect of land within the limits to which their compulsory powers extend, if, from unforeseen circumstances, the land taken under the first notice prove insufficient for the authorized purposes of the undertaking: <sup>(r)</sup> so, where a landowner is entitled by notice to require the Company to purchase his

(n) *Midland Counties Railway Company v. Oswin*, 1 Coll. 74.

(o) *Adams v. Blackwall Railway Company*, 14 Jur. 679, L. C.

(p) *Tawney v. Lynn and Ely Railway Company*, 16, L. J., N. S., Ch. 262, V. C. E.; and see *Reg. v. Birmingham and Oxford Junction Railway Company*, 15, L. T. 392.

(q) See *Salmon v. Randall*, 3 Myl. & C. 439; *Stone v. Commercial Railway Company*, 4 Myl. & Cr. 124; *Walker v. Eastern Counties Railway Company*, 6 Ha. 594. Where a will gave to A. an option of purchase within a limited period, a mere verbal declaration to the trustees that he intended to take the property, the purchase-money remaining unpaid and the conveyance unexecuted, was, of course, held insufficient to entitle him to the benefit of the option; *Dawson v. Dawson*, 8 Sim. 346.

(r) *The Queen v. London and South-Western Railway Company*, 12 Jur. 973, Q. B.

(r) *Stamps v. Birmingham and Stour Valley Railway Company*, 2 Phill. 673; 6 Rail. Ca. 123; and see *Simpson v. Lancaster and Carlisle Railway Company*, 15 Sim. 580.

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which all the circumstances are specified, and not require any external circumstances to explain it. It must likewise appear that the other party accepted the terms, and acted in consequence of them.

interest in lands affected by the undertaking, the service of such notice constitutes a binding contract.<sup>(s)</sup> Chapter VI.

But—and the case may be considered as exceptive from the first general rule—where B. had entered into a parol agreement to sell an estate to W., and B.'s agent, made out and signed a rent-roll, entitled "Rent-roll of lands agreed to be sold by B. to W. from May 1762, at 21 years' purchase for the clear yearly rent," and the amount of rent was then corrected by B. in his own handwriting, and the rent-roll so altered was delivered to W., and abstracts of title were also delivered, and B. sent letters to his creditors informing them of the sale, it was held, that there was no sufficient agreement;<sup>(t)</sup> nor will a letter suggesting an abandonment of a parol agreement,<sup>(v)</sup> take the case out of the Statute: but where, at law, an agreement was produced in the following words, viz. "A. having agreed to purchase of B. for 250*l.* the two leasehold houses situate, &c., B. hereby agrees to paper and paint; A. to pay 230*l.* at the time of the contract, and the remaining 20*l.* on the completion of the painting:" it was held, that the agreement to purchase, although recited as an existing agreement, was to be considered as forming part of the agreement produced.<sup>(w)</sup>

Rent rolls, abstract, &c., insufficient;

and letters to creditors;

or letter written as an abandonment.

[\*100]

Recital of agreement, held sufficient.

And it is, of course, necessary that the letter or other document relied on should be consistent with the parol agreement set up by the party relying on it.<sup>(x)</sup>

Document relied on must consist with alleged parol agreement. Whether both parties must be named.

As to both parties being named;—it is stated by Lord *Cowper*, (Lord Keeper,) "that if a man being in company makes offers of a bargain, and then writes them down and signs them, and another person then takes them up and prefers his bill, there will be a sufficient agreement;"<sup>(y)</sup> and the dictum, which is extrajudicial, is cited by Sir

(s) *Doe v. London and Croyden Canal Company*, 1 Rail. Ca. 257

(t) *Whaley v. Bagnet*, 1 Bro. P. C. 345: (the decision was upon the Irish Statute of Frauds, which corresponds with the English Act:) *Cooke v. Tombs*, 2 Anst. 420.

(v) *Gosbell v. Archer*, 2 Ad. & E. 500.

(w) *Hall v. Betty*, 4 Man. & G. 410.

(x) *Cooper v. Smith*, 15 East, 103.

(y) *Coleman v. Upcot*, 5 Vin. Ab. 527.

## Chapter VI.

*B. Sugden* : (z) however, in *Boyce v. Greene* (a) a memorandum in these words, "Sold 100 Mining Purdies at 17s. 6d." and signed by the vendor, was held insufficient, as not mentioning the name of the purchaser : (b) so, it has been held, that, in order to bind the purchaser by the auctioneer's entry, either the name of the vendor must appear by the entry itself or in the conditions or particulars thereby referred to, or the auctioneer must bind himself personally by his entry. (c)

As to the names in the case of an agreement by letter.

[\*101]

In the case of a letter, if the name of the party to whom it is addressed appear in an indorsed direction, or be written "at the foot of the letter, no difficulty on the above point can arise: if an envelope be used, the name may often not appear in the letter; but the Court, it is conceived, would receive evidence connecting the envelope with the inclosure.

Offer by letter, when binding.

Party accepting offer is not liable for delay in the post-office.

A letter, it may be remarked, binds the writer from the time of its transmission; nor of its receipt by the other party : (e) and a person bound to accept or reject an offer by a particular post, and duly posting his letter, is not responsible for delay in the post office; (f) even although, by mistake, he date his reply a day in advance, so that, through such delay, the letter be delivered at a time apparently consistent with its erroneous date. (g)

General description of property sufficient.

But there must be some description.

A general description of the estate,—e. g., "Mr. O.'s house," (h) or, "the property in Cable-street," (i) or, "the house in Newport," (k)—is sufficient; if parol evidence can be produced to show what property was intended: there must, however, be *some* description; e. g., a memo-

(z) *Sug.* 115.

(a) *Batty*, 608.

(b) See *Seagood v. Meale*, *Prec. Ch.* 560; *Champion v. Plummer*, 1 *Bos. & P.*, N. R., 254.

(c) *Wheeler v. Collier*, *Moo. & Malk.* 123; and see *Jacob v. Kirk*, 2 *Moo. & Rob.* 221.

(e) *Potter v. Sanders*, 6 *Ha.* 1.

(f) *Adams v. Lindsell*, 1 *B. & Ald.* 681.

(g) See *Dunlap v. Higgins*, 1 *H. of L. Ca.* 396.

(h) *Ogilvie v. Foljambe*, 3 *Mer.* 61.

(i) *Bleakley v. Smith*, 11 *Sim.* 150.

(k) *Owen v. Thomas*, 3 *Myl. & K.* 353.



random that a party has disposed of "his writings, (*i. e.*, Chapter VI. title deeds,) is insufficient.(*l*)

So, all the essential terms of the contract must be fixed, The writing must fix, or or, as in the case of the arbitration bond,(*m*) the means of provide the means of compulsorily fixing them with perfect accuracy must be fixing, all the terms of provided; thus, a receipt for the deposit has been held the terms of the agree- insufficient, because it did not state either the price or ment.  
[\*102]

what proportion the deposit bore to the price;(n) so, where the price was fixed subject to variation in respect of rent-charge, and it did not appear whether the amount \*was 5s. or 1s. *per annum*, the defect was held fatal;(nn) so, upon a sale subject to conditions, the auctioneer's receipt or entry would be void, unless it were actually annexed, or clearly referred, to the conditions.(o)

It is, however, not necessary that the terms should ap- But need not specify pear on the face of the instrument signed by the party to them: a be charged; which, when an agreement has to be made reference to out from correspondence, is seldom the case; it is suffi- other docu- cient if the instrument refer to other documents, (such as ments con- containing them is sufficient.

conditions of sale, previous letters, or, in fact, any other writings,) which contain the terms.(p)

Such writings, however, must clearly be referred to;(q) But the reference must be clear. and unless their entire contents are to form part of the agreement, it must distinctly appear what is and what is not to be so included: *e. g.*, where the signed writing referred to such of the clauses contained in a specified paper as had been read at a meeting between the parties, not stating *which* had been so read, it was held bad for uncertainty.(r)

(*l*) *Seagood v. Meale*, Prec. Ch. 560.

(*m*) *Supra*, p. 98.

(*n*) *Blagden v. Bradbear*, 12 Ves. 466.

(*nn*) *Lord Middleton v. Wilson*, Sug. 118.

(*o*) Sug. 121; *Hinde v. Whitehouse*, 7 East, 558, 569; *Kenworthy v. Schofield*, 2 B. & Cr. 945; and see *Coles v. Trecothick*, 9 Ves. 234.

(*p*) *Clinan v. Cooke*, 1 Sch. & Lef. 22, 33; *Allen v. Bennett*, 3 Taunt. 169; *Dobell v. Hutchinson*, 3 Ad. & El. 355; *Laythoarp v. Bryant*, 2 Bing. N. C. 735.

(*q*) *Boydell v. Drummond*, 11 East, 142; *Boyce v. Greene*, Batty, 608; *Jacob v. Kirk*, 2 Moo. & R. 221.

(*r*) *Brodie v. St. Paul*, 1 Ves. jnn. 326, 333; see 1 Sch. & Lef. 36.

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Patent ambiguity fatal; but parol evidence is admissible in aid of a defective reference, &c.

[\*103]

But agreement need not expressly specify the instrument referred to.

In the last case, it will be seen(*s*) that there was a defect *patent* on the face of the agreement: the agreement itself, according to its own grammatical construction, raised the question as to which of the clauses were intended; but in the case of a mere imperfect reference to another instrument, parol evidence is admissible to ascertain its identity;(*t*) so, parol evidence is admissible to explain the sense in which words, in themselves unintelligible, \*were used by the parties;(*tt*) or the peculiar meaning which local, professional, or trade usage, has attached to particular expressions.(*u*)

And it appears that, at least in the case of letters, there need not be any specific description of, nor even an *express* reference to, the prior documents; it will be sufficient if the court be clearly satisfied that a reference was in fact intended, and of the identity of the instrument.

For instance, where(*v*) A., the owner of W. farm, on the 5th July wrote a note in the third person to B., informing him that C. had made an offer for the farm, at a specified price, but that, if B. chose to have it at that price, C. would decline the purchase in his favor; B., it was alleged, wrote a note in reply, accepting the offer, but such note was not forthcoming; on the 11th July A. wrote to B., "I have just received yours; and am glad you have determined to purchase the W. farm: I will write to C. to inform him you have agreed to purchase the estate;"—Sir William Grant, relying on the words "determine" and "agree," as denoting an acceptance by B. of a previous proposal by A., instead of, as might have been the case, an independent offer by B., considered that the letter of the 11th was sufficiently connected with the note of the 5th, to show that A. agreed to sell upon the terms of that note; and specific performance was decreed accordingly.

(*s*) See 1 Sch. & Lef. 36.

(*t*) See *Clinan v. Cooke*, 1 Sch. & Lef. 33; *Saunderson v. Jackson*, 2 Bos. & P. 238.

(*tt*) *Sweet v. Lee*, 3 Man. & Gr. 452.

(*u*) *Vide infra*, Ch. XVII.

(*v*) *Western v. Russell*, 3 Ves. & B. 187.

So, upon a sale of goods, a subsequent letter written by the purchaser, and containing the following expressions, "The tobacco I want immediately forwarded; I likewise want the invoice of the rice and other tobacco," was held to be sufficiently connected with the previous entries of sale of the articles in the vendor's order book.<sup>(w)</sup>

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[\*104]

"In cases of correspondence the difficulty generally is, to determine whether there has been a concluded agreement or merely a treaty; as to which the following rule seems deducible from the authorities.

Tests of  
sufficiency  
in cases of  
correspond-  
ence.

If the original offer be met by a simple acceptance, the treaty is, of course, concluded; if the reply be either more or less than a simple acceptance, the variation must be acceded to by the original proposer; or there is no agreement: and this state of things will continue, until there is, upon the face of the correspondence, "a clear accession on both sides to one and the same set of terms."<sup>(x)</sup>

It must con-  
tain a clear  
accession by  
both parties  
to the same  
terms.

In a late case, where the defendant wrote at the foot of an agreement for an under-lease, "I have no objection to this agreement, supposing that there is nothing unusual in Sir R.'s (the ground landlord) leases, which I presume there is not;" and then, before the agreement with this variation had been acceded to by the other party, withdrew his offer; and it was contended that, inasmuch as the covenants were usual, he still remained bound; Sir J. Wigram, V. C., admitting that a case might exist in which the distinction between the original and altered agreement must be treated as plainly nugatory, held, that the case before him could not be considered as of that character, merely because the court might, upon argument, decide that the covenants were not unusual.<sup>(y)</sup>

Effect of  
conditional  
acceptance.

For, it may be observed, that an original offer, or, it is conceived, any subsequent proposal, which does not

Offer may be  
withdrawn  
before ac-  
ceptance.

(w) *Allen v. Bennet*, 3 Taunt, 169; and see, as to connecting one letter with another, although there is no express reference, *Greene v. Cramer*, 1 Con. & L. 64; *Skinner v. M'Douall*, 2 De G. & S. 265.

(x) 1 Coll. 312; and see, as to an immaterial addition to an acceptance, *Clive v. Beaumont*, 1 De G. & S. 397; *Gibbons v. North East Metropolitan Asylum District*, 11 Beav. 1.

(y) *Lucas v. James*, 7 Ha. 410; see cases referred to in last note.

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[\*105]

If rejected,  
 &c., ceases  
 to be bind-  
 ing.

Must be  
 accepted  
 within  
 reasonable  
 time.

Offer by  
 letter bind-  
 ing if ac-  
 cepted by  
 return of  
 post.

Agreement  
 binding,  
 although  
 sent as in-  
 structions to  
 a solicitor.

amount to a simple acceptance of the terms of the other party, may be withdrawn at any time before it is accepted; \*even although a time be named for its acceptance: (z) and that if rejected, either by an express refusal, whether written or verbal, (a) or a proposed variation either as to time for giving possession, or price, or, it is conceived, in any other particular, it at once ceases to be binding; (b) and the acceptance of an offer must be given within a reasonable time; (c) if, however, a person make an offer by post, he cannot retract it, if the other party, before receiving any notice of withdrawal, return an immediate acceptance. (d)

A writing which is signed by either party, and is perfect as respects the terms of the contract, will not be considered otherwise than final from the mere fact of its having, with the consent of the other party, been sent to a solicitor as instructions for the preparation of a more formal instrument. (e)

(4.) *As to the signature.*

Signature by  
 party  
 charged,  
 sufficient.  
 But party  
 bound may

It has been long settled that a party signing an agreement is *prima facie* bound by it, although it be not signed by the other party: (f) [1] but if only one be bound, he may,

(z) *Routledge v. Grant*, 4 Bing. 653; *Martin v. Mitchell*, 2 Jac. & W. 428; *Lucas v. James*, 7 Ha. 410.

(a) *Sheffield Canal Company v. Sheffield and Rotheram Railway Company*, 3 Rail. Ca. 121, R.

(b) *Routledge v. Grant*, 4 Bing. 653; *Hyde v. Wrench*, 3 Beav. 334; *Thornbury v. Beville*, 1 Y. & C. C. C. 554.

(c) *Kennedy v. Lee*, 3 Mer. 454; *Thornbury v. Beville*, 1 Y. & C. C. C. 554, 563.

(d) See *Dunlap v. Higgins*, 1 H. of L. Ca. 400; *Potter v. Sanders*, 6 Ha. 1.

(e) *Fowle v. Freeman*, 9 Ves. 354; see *Gibbins v. N. E. Metropolitan Desstitution Asylum*, 11 Beav. 1.

(f) Sug. 112; *Laythoarp v. Bryant*, 2 Bing. N. C. 735; *Fowle v. Freeman*, 9 Ves. 364; *Owen v. Thomas*, 3 Myl. & K. 353; *infra*, Ch. XVIII.

[1] The signing of the agreement by one party only, is sufficient, provided it is the party sought to be charged. He is estopped by his signature from denying that the contract was validly executed, though the paper be not signed by the other party, who sues for a performance. 2 Kent, 510; *Ballard v. Walker*, 3 John. Cas. 60; *Clason v. Bailey*, 14 Johns.

it would appear, require the other to signify in writing his assent to or dissent from the contract; and, unless this be acceded to, he may himself rescind it.<sup>(g)</sup>

Chapter VI.  
require  
other party  
to elect.

\*A signature printed, or stamped, instead of written, or by initials, may be binding;<sup>(h)</sup> but a mere description, although it satisfactorily identify the party, *e. g.*, "your affectionate mother," subscribed to a letter addressed to the son with his name and address in full, has been held insufficient.<sup>(i)</sup>[1]

[\*106]  
What  
signature  
sufficient.

And it appears that an agreement is not the less binding by reason of the alterations and signature being in pencil instead of ink.<sup>(k)</sup>

In pencil.

The Ecclesiastical Courts have held a signature to a

By married  
woman in

(g) 2 Jac. & W. 428.

(h) *Saunderson v. Jackson*, 3 Bos. & P. 238; *Schneider v. Norris*, 2 Mau. & S. 286; *Phillimore v. Barry*, 1 Camp. Ca. 513; *Sweet v. Lee*, 3 Man. & Gr. 452; and see *Blore v. Sutton*, 3 Mer. 245.

(i) *Selby v. Selby*, 3 Mer. 2.

(k) *Lucas v. James*, 7 Ha. 410.

Rep. 487; *Douglas v. Spears*, 2 Nott & M'Cord, 207; *Davis v. Shields*, 26 Wendell's Rep. 341. Formerly, the agreement must have been sealed, as well as signed; otherwise it could only be considered as a parol agreement; and that the writing was only evidence of it. But this has been altered, and signing being the only circumstance required by the words of the statute is now sufficient. See Cruise on Real Property, vol. 4, p. 34. It seems, that though the agreement be entirely written with the party's own hand, it is insufficient unless it is likewise signed by him or something equivalent is done to show that he looked upon it as completed; the party's not signing it, being evidence that he did not think it complete—that he had left it to an after consideration, and might make alterations or additions in it. *Ib.* Although a purchaser makes alterations in the draft of an intended conveyance, and returns it to the attorney of the vendor; yet this is not a sufficient signing within the statute. *Ib.* *Hawkins v. Holmes*, 1 P. Wms. 770, cited. In the case of a marriage settlement upon which the mother agreed to give a portion of £1000 with her daughter; and this agreement was recited in the articles, which the mother subscribed as a witness, well knowing and approving their contents; this was held a sufficient signing. For the meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand, and fraud on the other. Therefore, both at law and in equity, where an agreement has been reduced to such a certainty, and the substance has been complied with, in the material part, the forms have never been insisted on. *Welford v. Beazeley*, 3 Atk. 503.

[1] The mark of one unable to write, under certain circumstances is a sufficient signature. See 2 Kent Com. 511.

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surname of  
deceased  
husband.  
Signature  
by agent  
sufficient if  
agency  
proved.  
Agent is a  
competent  
witness.

will by a woman, twice married and then under coverture, in the name of her first husband, sufficient.(l)

And a signature in the name of an agent will bind the principal if the agency be established :(m) and the alleged agent may be examined either to prove or disprove the agency; but if his evidence go to impeach the validity of the authority under which he has professed to act, it will be received with the most anxious jealousy.(n)

Signature  
not neces-  
sarily placed  
at end of  
agreement.

The signature to formal agreements is, of course, usually found at the end of the document; it may, however, as in the case of a letter or agreement in the third person, be inserted in the beginning or any other part of the instrument, if inserted so as, in effect, to authenticate the entire document, and not to be exclusively applicable to particular purposes :(o) and this, according to some authorities, although, in the case of an agreement in the third person, a place be left for signature at the bottom, in the usual way :(p) however, in a recent case, where the agreement contained the names of the parties in the commencement, and concluded with the words, "as witness our hands," without being followed by any name or signature, the court took a more common-sense view of the question, and held that there was no sufficient signature :(q) so, the purchaser's signature, in a column left blank for that purpose in the printed particulars, may be sufficient.(r)[1]

Effect of  
leaving  
blank for  
signature.  
[\*107]

(l) *In the goods of S. Glover*, 11 Jur. 1022.

(m) *White v. Proctor*, 4 Taunt. 209; *Kennworthy v. Scofield*, 2 Barn. & Cr. 945.

(n) *Howard v. Braithwaite*, 1 Ves. & B. 202, 209.

(o) *Saunderson v. Jackson*, 2 Bos. & P. 238; Sug. 127; *Western v. Russell*, 3 Ves. & B. 187; *Propert v. Parker*, 1 Russ. & M. 625; *Bleakley v. Smith*, 11 Sim. 150; *Lobb v. Stanley*, 5 Ad. & El. N. S. 574; *Stokes v. Moore*, 1 Cox, 219.

(p) *Saunderson v. Jackson*, 2 Bos. & P. 239.

(q) *Hubert v. Treherne*, 3 Man. & Gr. 743; *Hubert v. Turner*, 4 Sc. N. R. 486.

(r) *Emmerson v. Heelis*, 2 Taunt. 38.

[1] It seems if the name be inserted in such a manner as to have the effect of authenticating the instrument, it is immaterial, in what part of it the name be found. *Clason v. Bailey*, 14 Johns. Rep. 484; *Penniman v. Hartshorn*, 13 Mass. Rep. 87; 2 Kent Com. 511.

And although a principal or his agent sign merely as a witness, he may be bound, if the signature amount to an acknowledgment of the existence of the agreement; *e. g.*, "witness A. B." <sup>(s)</sup> but where a person, whose formal signature would have bound the vendor, merely attested the execution of the agreement by the purchaser, this was held to be insufficient. <sup>(t)</sup> [2]

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Party bound by signature as witness:

but not as attesting witness.

The written approval by a professional agent, of a draft agreement, or of the draft conveyance which recites the agreement, will, it would seem, be insufficient; <sup>(u)</sup> this, however, was much questioned in a recent case, <sup>(v)</sup> which was eventually decided on a collateral point: the effect of a similar approval of a draft agreement by one of the parties, is more doubtful; <sup>(w)</sup> the circumstances of the party signing such approval being in the legal profession would, it is conceived, be unfavorable to the sufficiency of the signature; the alteration of the draft conveyance by one of the parties has been held insufficient: about which, \*upon the case <sup>(y)</sup> as reported, there could scarcely have been a doubt; as it does not appear that the alterations comprised the name of the party making them: in the case of *Ithel v. Potter*, <sup>(z)</sup> a similar decision was come to where the entire conveyance had been written by the defendant; but it does not appear whether the conveyance

Approval of draft agreement or conveyance, whether sufficient.

[108]

(s) 9 Ves. 234, 251.

(t) *Gosbell v. Archer*, 2 Ad. & El. 500.

(u) See Sug. 128.

(v) *Thornbury v. Bevil*, 1 Y. & C. C. 554.

(w) See Sug. 129; *Doe v. Pedgriph*, 4 Car. & P. 312; *Parker v. Smith*, 1 Coll. 608.

(y) *Hawkins v. Holmes*, 1 P. Wms. 770; and see *Stokes v. Moore*, 1 Cox, 219.

(z) 1 P. Wms. 771.

[2] In *Coles v. Trecothick*, 9 Ves. Rep. 234, it was held by Lord Eldon that a vendor of an estate was bound by the signature of the agent's clerk thus "Witness, E. S. for Mr. Smith, agent for the seller," upon evidence of assent. He expressed his approbation of the doctrine laid down in *Welford v. Beazeley*, that where either the party himself, or a person duly authorized by him, ascertains the agreement by a signature in the form of addition, such signature ascertains the agreement sufficiently within the statute.

## Chapter VI.

recited the agreement, although such, probably, was the case: in a case where the draft of a lease had, in pursuance of a parol agreement, been forwarded to the intended lessee for perusal, and he indorsed and signed a memorandum upon it, requesting the lessee to endeavor to relet the premises, as it would be inconvenient for him (the lessee) to perform his agreement, this was held to be sufficient.(a)

Signature by  
public com-  
panies, &c.

A contract by a corporation aggregate, should, as a general rule, be under their common seal;(b) but, by the Companies Clauses Consolidation Act, 1845, any contract entered into on behalf of a company coming within the provisions of the act, and which, if made between private persons, would require to be in writing, and to be signed by the parties to be charged therewith, may be made, varied, or discharged in writing, signed by any two of the directors.(c)

Party alter-  
ing agree-  
ment loses  
his rights  
thereunder.

We may here observe, that any alteration made by either party in a material part of a written contract, without the consent of the other party, destroys the rights under the contract of the party making the alteration.(d)

[\*109]

\*(5.) *As to the stamps.*[1]

As to stamps  
on agree-  
ments.

The agreement, if under seal, is a deed, and chargeable with duty as such;(dd) if not under seal, and if the subject-matter be of less value than 20*l.*, no duty is payable; and if, on a sale by auction, the same person buy

(a) *Shippey v. Derrison*, 5 Esp. Ca. 190.

(b) See *Corporation of Ludlow v. Charlton*, 6 Mee. & W. 815; *Cope v. Thames Haven Company*, 3 Exch. 841; 6 Rail. Ca. 83.

(c) 8 Vict. c. 16, s. 97.

(d) *Powell v. Divett*, 15 East, 29; *Davidson v. Cooper*, 13 Mee. & W. 343; *Mollett v. Wackerbarth*, 5 C. B. 181.

(dd) See *Robinson v. Drybrough*, 6 Durn. & E. 317.

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[1] It should be observed that the English law requiring all deeds to be stamped, does not prevent their legal effect and operation, but only suspends their being pleaded, or given in evidence, or admitted in any court to be good, useful, or available till the duty and penalty be paid, and the deed properly stamped. The omission of the stamps, in the first instance, is therefore immaterial, if the deed be afterwards duly stamped. See Cruise on Real Property, c. 4, p. 25.



several lots, a distinct contract arises for each lot : and, whatever may be the aggregate amount, no stamp is required for any lot which separately sells for less than 20*l.* : (e) if the purchase-money exceed 20*l.*, and the agreement contain less than 1081 words, a 2*s.* 6*d.* stamp only is payable ; (f) this may, without payment of a penalty, be affixed within fourteen days after execution ; after that time a 10*l.* penalty becomes payable : (g) where a series of letters or other documents constitutes an agreement, and contains altogether less than 1081 words, the 2*s.* 6*d.* stamp would seem to attach upon only one of them ; (h) an agreement containing more than 1080 words, is, as respects the time for stamping, subject to the same provisions and regulations as a deed ; (i) and, prior to the 11th October, 1850, was liable to a 35*s.* stamp, and (if it exceeded 2159 words) to 25*s.* followers ; but, under the late act, a 2*s.* 6*d.* stamp only is payable for the first 1080 words, with 2*s.* 6*d.* followers : if, however, an agreement consist of a series of letters, no progressive duty attaches, (j) although the letters were written, not by the \*contracting party himself, but by his agent : (k) a contract by the assignees of a bankrupt for the sale of his real estate, is exempt from stamp duty ; (l) as, also, are agreements under the acts for promoting the residence of the Parochial Clergy, the Church-building, Poor Law,

[\*110]

(e) *Emmerson v. Heelis*, 2 Taunt. 38 ; *Roots v. Lord Dormer*, 4 B. & Ad. 77.

(f) 7 Vict. c. 21 ; 13 and 14 Vict. c. 97.

(g) See 7 Vict. c. 21, s. 5 ; and this does not seem to be affected by the new act ; see proviso to sect. 12.

(h) See 55 Geo. III. c. 184, sched. "Agreement;" and *Parkins v. Moravia*, 1 Car. & P. 376 ; *Peate v. Dicken*, 1 Cr. M. & R. 422 ; and see Tilsley on the Stamp Laws, 43, 1st edit.

(i) See 55 Geo. III. c. 184, s. 9.

(j) See schedule to 55 Geo. III. c. 184, title "Agreement." The new act declares, retrospectively and prospectively, that progressive duty is not payable in respect of stamped instruments being incorporated with or referred to in the principal instrument ; see sect. 11 ; and see *Sneezum v. Marshall*, 7 Mee. & W. 417.

(k) *Grant v. Maddox*, 15 Mee. & W. 737.

(l) *Flather v. Stubbs*, 6 Jur. 102 ; see 6 Geo. IV. c. 16, s. 98 ; and 12 and 13 Vict. c. 106, s. 138.

Chapter VI. Tithe Commutation, and Commons Inclosure Acts, and agreements entered into by the Commissioners of Woods and Forests.(*m*)

Several stamps, when requisite.

There must, in general, be distinct stamps for each distinct agreement or contract; upon this principle, where a person purchases several lots at an auction, the agreement must bear a stamp in respect of each lot for which the purchase-money exceeds 20*l*.:(*n*) upon a purchase from persons having separate interests in an estate, (*e. g.*, tenants in common, or tenant for life and remainderman,) the agreement, if so worded as to be a contract for the entire estate, would seem to be subject only to single duty; but if, on the contrary, it were so worded as to amount to separate contracts with the several vendors for their separate interests in the property, so as to give to each vendor a right to enforce the agreement in respect of his own particular interest, it is conceived that separate stamps would be requisite.

Loss of unstamped agreement, effect of.

[\*111]

If the agreement be not stamped, and be subsequently lost, or even destroyed by the fraudulent act of the party chargeable thereon, a court of equity can give no relief unless the plaintiff can procure a copy and get it stamped \*at the stamp office; the defendant, if he have a copy, will be ordered to produce it for that purpose;(o) and it appears that a copy may be made from recollection, if the witness can swear to the precise terms, and not merely the general tenor, of the instrument:(*p*) and the court will, in the absence of circumstances inducing a supposition to the contrary, presume that a lost instrument was duly stamped;(q) or, that obliterated stamps were of the right amount.(*r*)

Instrument recording transfer of

It has been held by the Court of Exchequer, that any instrument operating as a record of the transfer of pro-

(*m*) See Tilsley on Stamps, 759 to 762, 1st edit.

(*n*) See *James v. Shore*, 1 Stark. 426; *Walling v. Horwood*, 12 Jur. 48.

(*o*) See *Bousfield v. Godfrey*, 5 Bing. 418; *Blair v. Ormond*, 1 De G. & S. 428.

(*p*) *Smith v. Henley*, 1 Ph. 391.

(*q*) See cases referred to in last two notes, and *Hart v. Hart*, 1 Ha. 1; *Crowther v. Solomons*, 6 C. B. 758.

(*r*) *Doe v. Coombs*, 6 Jur. 930, Q. B.

perty, (not being goods, wares, or merchandise,) *e. g.*, a memorandum that A. *has sold* all the goods and *fixtures* in a certain shop, is a conveyance within the meaning of the stamp laws, and must bear the *ad valorem* duty.<sup>(s)</sup>

Chapter VI.  
property is  
liable to duty  
as a convey-  
ance.

We may here remark, that an agreement in evasion of the stamp laws, *e. g.*, that the document shall, for the present, remain unstamped, but that, if it shall become necessary to stamp it, one of the parties thereto will pay the penalty, cannot be enforced.<sup>(t)</sup>

Agreement,  
in evasion of  
the stamp  
laws, void.

#### (6.) *As to illegal agreements.*

And, as a general rule, no agreement can be enforced, at law or in equity, which is entered into for an illegal purpose;<sup>(u)</sup> and there are certain agreements which the legislature has pronounced to be, in their own nature, illegal; the Statute of 32 Henry VIII.,<sup>(v)</sup> renders it \*unlawful to buy or sell any pretended right or title to any lands or hereditaments, unless the vendors, or their ancestors, or the persons through whom the claim is derived, have been in possession of the property, or of the reversion or remainder thereof, or taken the rents or profits thereof, within a year before the sale; but the purchase of a pretended title, by a person in lawful possession of the rents and profits, is allowable;<sup>(w)</sup> in a recent case, where A., possessed of a term of years, died in 1828, and strangers entered and occupied until 1841, when A.'s next of kin took out letters of administration and sold and assigned the term, the assignment was held to be clearly void;<sup>(x)</sup> so, the act extends to a lease under a pretended title;<sup>(y)</sup> and to the assignment of the mere right to file a bill to set aside a previous voidable conveyance;<sup>(z)</sup> but not to an assignment of a purchaser's interest under the

Agreement,  
for any ille-  
gal purpose,  
void.

[\*112]  
ChamPERTY  
and mainte-  
nance.

(s) *Horsfall v. Hey*, 2 Exch. 778.

(t) *Abbott v. Stratten*, 3 Jo. & Lat. 616.

(u) *Vide infra*, Ch. XVII. and XVIII.

(v) See sec. 2.

(w) See sect. 4.

(x) *Doe d. Williams v. Evans*, 1 C. B. 717.

(y) *Hitchins v. Lander*, G. Coop. 34.

(z) *Prosser v. Edmonds*, 1 Y. & C. Exch. 481.

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agreement for sale;(a) nor to an assignment of the subject-matter of a suit;(b) unless the purchaser agree to indemnify the vendor against the costs incurred or to be incurred in the suit;(c) nor, even then, if the purchaser have a previous common interest in the event of the suit; as in the case of a purchase, by a second mortgagee, of the interest of the first mortgagee, during a suit in which the mortgaged property is claimed under a paramount title:(d) nor to an agreement to enable the purchaser of an estate to recover for rent due, or injury done to the property, prior to the purchase:(e) nor to a conveyance to a reversioner or remainderman, with a view to strengthen his estate;(f) \*nor to cases where the right purchased is originally clear, but the litigation results from circumstances subsequently arising or subsequently known.(g)[1]

[\*113]

(a) Sug. 422; and see 8 and 9 Vict. c. 106, s. 6.

(b) *Harrington v. Long*, 2 Myl. & K. 590; see *Martyn v. Macnamara*, 2 Con. & L. 541.

(c) *Harrington v. Long*, *ubi supra*.

(d) *Hunter v. Daniel*, 4 Ha. 420.

(e) Sug. 423; *Williams v. Protheroe*, 5 Bing. 309.

(f) Co. Litt. 369, b.; see *Anson v. Lee*, 4 Sim. 364.

(g) *Wilson v. Short*, 6 Ha. 366.

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[1] "There is one check," says Kent, (4 Kent Com. 446,) "to the power of alienation of a right or interest in law, taken from the statute of 32 Hen. VIII. c. 9, against selling pretended titles; and a pretended title, within the purview of the common law, is where one person lays claim to land of which another is in possession, holding adversely to the claim. Every grant of land, except as a release, is void as an act of maintenance, if, at the time, the lands are in the actual possession of another person, claiming under a title adverse to that of the grantor. This principle, it is believed and assumed, prevails very generally in the jurisprudence of this country, and it has always been received as settled law in New York, and it has been incorporated into the Revised Statutes, vol. 1, p. 739, secs. 147, 148. But even in such a case, the claimant is allowed by the statute to execute a valid mortgage of the lands, which has preference, from the time of recording it, over subsequent judgments and mortgages, and binds the lands from the time of recovering possession. The statute of 32 Hen. VIII. imposed a forfeiture upon the seller, of the whole value of the lands sold, and the same penalty upon the buyer also, if he purchased knowingly. This same statute was re-enacted literally in New York, in 1788; and in Virginia, in 1786; and in North Carolina, in their Revised Statutes, 1837; but, the penal provisions are altered by the New York Revised Statutes, vol. 2, p. 691, sec. 6, 7, which have abolished the forfeit-

By the act of the 7 and 8 Will. III., c. 25, s. 7, it is declared, that all conveyances made of any hereditaments, in order to multiply voices, or to split and divide the interest in any houses or lands among several persons, to enable them to vote at elections of members to serve in parliament, are void and of none effect: it appears, however, to be settled by recent decisions, that a conveyance made to carry into effect a real *bona fide* contract for sale, where the purchase-money is paid and possession taken without any secret reservation or trust for the benefit of the seller, is not within the statute; although it be made with a view to the multiplying voices, or the splitting of the freehold; the intention of the statute being, to avoid such conveyances only, made with that view, as are in themselves fraudulent and collusive: (h) and the same test of validity must of course be applied to agreements upon which such conveyances are founded.

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Splitting  
votes for  
electioneer-  
ing purposes

(k) *Riley, App.; Crossley, Resp.*, 2 C. B. 146; *Alexander, App.; Newman, Resp.*, *ibid.* 122; *Thornily, App.; Aspland, Resp.*, *ibid.* 160.

ure, and made it a misdemeanor for any person to buy or sell, or make or take a promise or covenant to convey, unless the grantor, or those by whom he claims, shall have been in possession of the land, or of the reversion or remainder thereof, or of the rents and profits, for the space of a year preceding. The provision does not apply to a mortgage of the lands, nor to a release of the same, to the person in lawful possession. To take a conveyance of land, or of any interest therein, from a person not in possession, while the land is the subject of controversy by suit, and with knowledge of the suit, and that the grantor was not in possession, is declared to be a misdemeanor. As the conveyance, in the cases specified, is a mere nullity, and has no operation, the title continues in the grantor so as to enable him to maintain an ejectment upon it; and, the void deed cannot be set up by a third person, to the prejudice of his title. But, as between the parties to the deed, it might operate by way of estoppel, and bar the grantor. The deed is good, and passes the title as between the grantor and grantee." The doctrine here stated prevails in Connecticut, Massachusetts, Vermont, Maryland, Virginia, North Carolina, Tennessee, Kentucky, Mississippi, Ohio, and Indiana. In New Hampshire, Pennsylvania, Illinois, Missouri, and Louisiana, it does not exist.

## \*CHAPTER VII.

AS TO THE EFFECT OF THE CONTRACT ON THE RIGHTS  
OF THE PARTIES.

1. *Purchaser entitled to estate, and vendor to purchase-money.*
2. *Purchaser's general rights under contract as against vendor.*
3. *Vendor's general rights under contract as against purchaser.*
4. *Rights of vendor and purchaser, inter se, not affected by death, bankruptcy, &c., of either party.*
5. *Death of vendor before completion,—its effect on relative rights of his real and personal representatives, under old, and under new law.*
6. *Death of purchaser before completion,—its effects on relative rights of his real and personal representatives, under old, and under new law.*
7. *Effect of contract in various special cases.*

Purchaser  
entitled to  
estate, and  
vendor to  
purchase-  
money.

(1.) FROM the time of the owner of an estate having entered into a binding agreement for its sale, he holds the same in trust for the purchaser, subject to payment of the purchase-money; and, if the agreement be binding on the purchaser, he, on the other hand, is, as a general rule, under a personal equitable, as well as legal liability to the vendor for payment of the purchase-money.(a)[1]

(a) See *Green v. Smith*, 1 Atk. 572; *Toft v. Stephenson*, 7 Ha. 1.

[1] Under such circumstances, the vendee is treated as the owner of the land, and it is devisable and descendible as his real estate. On the other hand, the money is treated as the personal estate of the vendor, and is subject to the like modes of disposition by him as other personalty, and is distributable in the same manner on his death. *Craig v. Leslie*, 3 Wheat. Rep. 577; *Beverly v. Peter*, 10 Peters' Rep. 532, 533. At law, contracts respecting lands, or other things of which a specific execution will be decreed in equity, are considered as simple executory agreements, and as not attaching to the property in any manner, as an incident, or as a pre-

And the agreement equally binds the estate, \*although the vendor be a trustee, or a mere donee of a power of sale, instead of absolute owner.

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Although vendor be a trustee, or donee of power.

(2.) *As to purchaser's general rights under contract as against vendor.*

It is sometimes stated, in general terms, that by the contract the purchaser becomes, in equity, the owner of the property: but "this rule applies only as between the parties to the contract, and cannot be extended so as to affect the interest of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it. Before the contract is carried into effect, the purchaser cannot, against a stranger to the contract, enforce equities attaching to the property:"(b) so, notice of an incumbrance given to the purchaser before the execution of the conveyance is effectual, although the purchase-money be actually paid;(c) and the purchaser,

General nature of purchaser's equitable ownership; strangers to contract not affected by it.

(b) *Per* Lord Cottenham, in *Tusker v. Small*, 3 M. & C. 70.

(c) *Wigg v. Wigg*, 1 Atk. 384.

sent or future charge. But equity regards them in a very different light. It treats them, for most purposes, precisely as if they had been specifically executed. So that, if a man has entered into a valid contract for the purchase of land, he is treated, in equity, as the equitable owner of the land; and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made, and it passes by descent to his heir, as land. The vendor is deemed in equity, to stand seized of it, for the benefit of the purchaser; and the trust attaches to the land, so as to bind the heir of the vendor, and every one claiming under him as purchaser, with notice of the trust. The heir of the purchaser may come into equity and insist upon a specific performance of the contract; and, unless some other circumstances affect the case, he may require the purchase-money to be paid out of the personal estate of the purchaser in the hands of his personal representative. On the other hand, the vendor may come into equity for a specific performance of the contract on the other side, and to have the money paid; for, the remedy in cases of specific performance is mutual, and the purchase-money is treated as the personal estate of the vendor, and goes as such to his personal representatives. 1 Fonbl. Eq. B. 1, ch. 6, sec. 9; Story's Eq. Juris. vol. 2, sec. 790; *Champion v. Brown*, 6 John. Ch. Rep. 402. See *Comer v. Lewis*, 4 Shepl. Rep. 268.

Chapter VII. although he may then have, or subsequently acquire, the legal estate, can, it is conceived, use it against the incumbrancer only to the extent of securing such purchase-money. His interest under the contract may, however, be charged, or assigned, *(d)* and will be bound by a judgment; *(e)* but the incumbrancer, assignee, or creditor, can only obtain relief, as against the vendor, on the terms of undertaking all the purchaser's liabilities under the contract. *(f)*

Vendor entitled to profits, until time fixed for completion.

[\*116]

Whether he may take crops after time fixed for, but pending completion.

Windfalls &c., belongs to purchaser from date of contract.

Material alteration of property by vendor avoids the contract; e. g. a fall of ornamental timber.

Up to the time fixed for completion, the vendor is, in the absence of special stipulation, entitled to the crops, or other ordinary profits of the land; he would not, however, it is conceived, be entitled to take crops in an immature state, or otherwise than in due course of husbandry. After the time fixed for completion, and pending negotiation, he may, it appears, in due course of husbandry, cut coppice and get in crops, but the net profits will belong to the purchaser. *(g)*

Everything, however, which forms part of the inheritance belongs to the purchaser from the date of the contract; so that he is entitled to windfalls, *(h)* and to the produce of ordinary timber cut, *(i)* or, it is conceived, stone or gravel quarried or dug by the vendor after the contract. *(j)*

And any act by the vendor, which prevents his giving to the purchaser that which was, substantially, the subject matter of the contract, renders the agreement voidable by the latter; e. g., the felling of ornamental timber; *(k)* and, even as to ordinary timber, the authorities merely show that the fall of it *may* be matter for com-

*(d)* 6 Ves. 352; *Seton v. Slade*, 7 Ves. 274.

*(e)* *Baldwin v. Belcher*, 1 J. & L. 18.

*(f)* *Dyer v. Pulteney*, Barn. Ch. R. 160.

*(g)* *Poole v. Shergold*, 1 Cox, 273; Sug. 819; see, as to manorial fines, on purchase of a manor, *Garrick v. Lord Camden*, 2 Cox, 231 (stated *infra*, Ch. XIX.); and *Earl of Hardwicke v. Sandys*, 12 Mee. & W. 761.

*(h)* *Poole v. Shergold*, *ubi supra*.

*(i)* *Magennis v. Fallon*, 2 Moll. 591.

*(j)* See *Nelson v. Bridges*, 2 Beav. 239.

*(k)* *Magennis v. Fallon*, *ubi supra*.



pensation ; cases might, it is conceived, occur, in which the Court would relieve a purchaser on account of falls of wood, although neither planted nor left for ornament or shelter. Chapter VII.

And since, as between the parties to the contract, the purchaser is owner of the estate, he has the benefit of any improvements to the property which may happen after the date of the contract ; *e. g.*, the dropping of lives on the purchase of a reversionary interest,<sup>(l)</sup> or a sudden rise in the value of land from its being required for a public purpose :<sup>(m)</sup> and must bear any loss which occurs without the fault of the vendor ; *e. g.* the death of the *cestui que vie*, on the purchase of an estate for life, or a life annuity ;<sup>(n)</sup> or the destruction of house property by fire ;<sup>(o)</sup> and, as respects fire, the vendor, unless he agree that the property shall be kept insured, or, it would seem, make some proposition to the purchaser grounded upon the fact of its being insured, is not bound to keep up the insurance, or to give the purchaser notice of its having dropped ;<sup>(p)</sup> [1] so, also, the purchaser of house property must make good any injury done to adjoining premises by the fall of the buildings subsequently to the contract.<sup>(q)</sup>

Purchaser takes accidental benefit, and bears accidental losses, as in cases of Death of tenant for life :

or of *cestui que vie* :

[\*117]

or fire

Vendor whether bound to insure.

And where the accruing benefit is such, that, if taken by the purchaser, it would or might be irrevocably lost to the vendor, (as in the case of a vacancy occurring, pending discussions on the title to an advowson,) the purchaser

Restrictions on purchaser's right,—case of vacancy on sale of advowson.

(l) 1 Madd. 539.

(m) 6 Ves. 358.

(n) Sug. 330; and see 6 Ves. 352.

(o) *Paine v. Meller*, 6 Ves. 349.

(p) 6 Ves. 353.

(q) *Skelton v. Robertson*, 14 Jur. 323.

[1] In a case where A. had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee; Lord Eldon being of opinion, that no solid objection could be founded on the mere effect of the accident; because, as the party by the contract became in equity the owner of the premises, they were his, to all intents and purposes. Sug. on Vend. vol. 1 p. 337.

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claiming the benefit must accept the title: (r) in *Wyvill v. Bishop of Exeter*, (s) the right to present was altogether denied him, on the ground of his objections to the title having been frivolous; but the case seems of doubtful authority. (t)

Estate sold in consideration of life annuity;—purchaser is entitled to, on death of cestui que vie before conveyance;—subject to what restrictions.

So, in the converse case of an estate being sold in consideration of a life annuity, and of the *cestui que vie* dying before completion, the purchaser will be entitled to a conveyance on a payment of the arrears; (u) it is, however, as a general rule, essential, in such a case, that he should, in the lifetime of the *cestui que vie*, have made, or tendered, any payment which became due during such lifetime; (v) the rule, however, it is presumed, would not apply, unless a sufficient interval had elapsed between the payment becoming due and the death, to allow of payment or tender \*being made according to the usual course of business: the omission, in fact, must amount to *laches*: (w) nor, on the other hand, where a payment had been previously refused or long neglected, is it likely that a court of equity would be satisfied with payment or tender made at a time when the *cestui que vie* was, to the knowledge of the purchaser, dying or dangerously ill: it was laid down, in a recent case, (x) that although the court, upon sales of property in consideration of an annuity, will enforce specific performance notwithstanding the death of the annuitant, it will inquire with some jealousy into the fairness of the transaction, and will require a clear case for specific performance under such circumstances.

Sales by court.

We shall hereafter have occasion to consider the above rules, with reference to sales under a decree of the Court of Chancery. (y)

Contract by public company under usual compulsory

Where a public company, under the usual compulsory power, contracts for the purchase of part only of the land

(r) Sug. 332.

(s) 1 Pri. 292.

(t) Sug. 332.

(u) *Mortimer v. Capper*, 1 Bro. C. C. 156.

(v) *Jackson v. Lever*, 3 Bro. C. C. 605; *Pope v. Roots*, 1 Bro. P. C. 370.

(w) See Sug. 336.

(x) *Davis v. Cooper*, 5 M. & C. see. p. 279.

(y) *Infra*, Ch. XIX.

subject to the power, this will not prevent their subsequently exercising it in respect of the residue.(z)

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power, does  
not exhaust  
the power.

(3.) *As to vendor's general rights under contract as against purchaser.*

The vendor has a lien upon the estate for the unpaid purchase-money ;(a)[1] if therefore, before payment, the

Vendor's  
lien on  
estate.

(z) *Simpson v. Lancaster and Carlisle Railway Company*, 15 Sim. 590 ; *Stamps v. Birmingham and Stour Valley Railway Company*, 2 Ph. 673 ; 6 Rail. Ca. 123.

(a) As to which, *vide infra*, Ch. XIV.

[1] "The vendor of real estate," says Kent, "has a lien, under certain circumstances, on the estate sold, for the purchase money. The vendee becomes trustee to the vendor, for the purchase money, or so much as remains unpaid; and the principle is founded in natural equity and seems inherent in the English equity jurisprudence. This equitable mortgage will bind the vendee and his heirs and volunteers, and all other purchasers from the vendee, with notice of the existence of the vendor's equity. *Prima facie* the lien exists without any specific agreement for that purpose, and it remains with the purchaser to show that, from the circumstances of the case, it results that the lien was not intended to be reserved, as by the taking other real or personal security, or where the object of the sale was not money, but some collateral benefit. In *Mackreth v. Symmons*, 15 Ves. Rep. 393. Lord Eldon discusses the subject at large, and reviews all the authorities; and he considers this doctrine of equitable liens to have been borrowed from the text of the civil law; and it has been extensively recognized and adopted in these United States. It has been a question much discussed as to the facts and circumstances which would amount to the taking of security from the vendee, so as to destroy the existence of the lien. In several cases, it is held that taking a bond from the vendee for the purchase money, or the unpaid part of it, affected the vendor's equity, as being evidence that it was waived; but the weight of authority, and the better opinion is, that taking a note, bond, or covenant, from the vendee, for the payment of the money, is not, of itself, an act of waiver of the lien, for such instruments are only the fiduciary evidence of the debt. Taking a note, bill, or bond, with distinct security, or taking distinct security exclusively by itself, either in the shape of real or personal property, from the vendee, or taking the responsibility of a third person, is evidence that the seller did not repose upon the lien, but upon the independent security, and it discharges the lien. Taking the deposit of stock is also a waiver of the lien; and notwithstanding the decision of the master of the rolls, in *Grant v. Mills*, holding that a bill of exchange drawn by the vendee, and accepted by him and his partner, did not waive the lien; the sounder doctrine and the higher authority is, that taking the responsibility of a third person for the purchase money is taking the se-

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He may  
restrain a  
fall of tim-  
ber by pur-

purchaser be in possession, equity will restrain him from any act,—such as felling timber,—by which the vendor's

curity and extinguishes the lien. It has also been decided by the Supreme Court of the United States, after a full examination of the question, and upon grounds that will probably command general assent, that the vendor's lien cannot be retained against creditors holding under a *bona fide* mortgage or conveyance from the vendee, nor against a subsequent purchaser without notice. The lien will prevail, however, against a judgment creditor of the vendor, intervening between the time of the agreement to convey, and receipt of the consideration money, and the actual conveyance. Under these circumstances, the vendor is justly considered in the light of a trustee for the purchaser. But in that case an intervening mortgagee or purchaser for a valuable consideration, and without notice, would be preferred." See 4 Kent's Com. 152, 153, 154, and *authorities*.

"It has been sometimes suggested," says Judge Story, "that the origin of this lien of the vendor might be attributed to the tacit consent or implied agreement of the parties. But, although, in some cases, it may be perfectly reasonable to presume such a consent or agreement, the lien is not, strictly speaking, attributable to it, but stands independently of any such supposed agreement. On other occasions, the lien has been considered as a natural equity, having its foundation in the earliest principles of courts of equity. Thus, it has been broadly contended that, according to the law of all nations, the absolute dominion over property sold is not acquired by the purchaser until he has paid the price, or has otherwise satisfied it, unless the vendor has agreed to trust to the personal credit of the buyer. For a thing may well be deemed to be unconscionably obtained when the consideration is not paid. The true origin of the doctrine may, with high probability, be ascribed to the Roman law, from which it was imported into the equity jurisprudence of England. By the Roman law, the vendor of property sold had a privilege or right of priority of payment in the nature of a lien on the property for the price for which it was sold, not only against the vendee and his representatives, but against his creditors, and also against subsequent purchasers from him. For it was a rule of that law, that although the sale passed the title and dominion in the thing sold, yet it also implied a condition that the vendee should not be master of the thing so sold unless he had paid the price, or had otherwise satisfied the vendor in respect thereof, or a personal credit had been given to him without satisfaction. The rule was equally applied to the sale of movable and immovable property; and equally applied, whether there had been a delivery of possession to the vendee or not. If there was no such delivery of possession, then the vendor might retain the property as a pledge until the price was paid. If there was such a delivery of possession then the vendor might follow the property into the hands of any person to whom it had been subsequently passed, and reclaim it, or the price. The close analogy, if not the absolute identity between the English and Roman law, on the same subject, seems to demonstrate a common origin, although in England the lien is ordinarily confined to cases of the sale of immovables; and it does

security might be depreciated; (b) if, however, only an \*inconsiderable part of the purchase-money remain unpaid, it may be conjectured that the vendor, applying for the injunction, would, as would an ordinary mortgagee, have to satisfy the court of the estate without the timber being

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chaser in  
possession.  
Under what  
circumstan-  
ces.

(b) *Crockford v. Alexander*, 15 Ves. 138.

not extend to movables where there has been a transfer of possession. There are, however, some exceptions from the doctrine in each law, founded upon the same general principle, but admitting of some diversity, in respect to its practical application." Story's Eq. Juris. secs. 1220, 1221, 1222. See also ib. sec. 1217, *note*.

The following are the principal American authorities on this subject :—

A vendor of land who has conveyed by deed, has a lien in equity upon the land for the payment of the unpaid purchase money, against the vendee or purchasers from him with notice. *Ross v. Whilson*, 6 Yerg. 50; *Oulton v. Mitchell*, 4 Bibb, 239; *Eubank v. Poston*, 5 Mon. 287; *White v. Casanave*, 1 Har. & John. 106; *Ghiselin v. Ferguson*, 4 Har. & John. 522; *Graves v. M'Call*, 1 Call, 414; *Galloway v. Hamilton*, 1 Dana, 576; *Hundley v. Lyons*, 5 Munf. 342; *Wynne v. Alston*, 1 Dev. Eq. 163; *Henderson v. Stewart*, 4 Hawks, 256; *Watson v. Wells*, 5 Conn. Rep. 468; *Greenup v. Strong*, 1 Bibb, 590; *Meek's heirs v. Ealy*, 2 J. J. Marsh. 330; *Voorhies v. Instone*, 4 Bibb, 354; *Garson v. Green*, 1 Johns. Ch. Rep. 308; *Bayley v. Greenleaf*, 7 Wheat. 46, 50; *Clark v. Hunt*, 3 J. J. Marsh. 557; *Roberts v. Salisbury*, 3 Gill & Johns. 425; *Blight's heirs v. Banks*, 6 Monroe, 198; *Kenny v. Collins*, 4 Litt. 289; *Eubank v. Poston*, 5 Monroe, 287; *Eskridge v. M'Clure*, 2 Yerg. 84; *Edwards v. Bohannon*, 2 Dana, 99; *Hatcher v. Hatcher*, 1 Rand. 53; contra, *Blight's heirs v. Banks*, 6 Monroe, 199; *Ducker v. Gray*, 3 J. J. Marsh. 163; *Edwards v. Bohannon*, 2 Dana, 99; *Taylor v. Adams*, Gilmer, 329; *Warner v. Van Alstyne*, 3 Paige, 513; *Champion v. Brown*, 6 Johns. Ch. Rep. 402; *Graham v. McCampbell*, 1 Meigs' Rep. 52; *Gunn v. Chester*, 5 Yerg. 295; *Johnson v. Carothorn*, 1 Dev. & Batt. 32; *Harper v. Williams*, 1 Dev. & Batt. 379; *Shearatz v. Nicodemus*, 7 Yerg. 1; *Wilson v. Graham's ex'r.*, 5 Munf. 297; *Greenup v. Strong*, 1 Bibb, 590; *Clark v. Hunt*, 3 J. J. Marsh. 559; *Johnson v. Thompson*, 4 J. J. Marsh. 382; *Eskridge v. M'Clure*, 2 Yerg. 85; *White v. Williams*, 1 Paige, 502; *Garson v. Green*, 1 Johns. Ch. Rep. 308; *Cox v. Fenwick*, 3 Bibb, 183; *Eskridge v. M'Clure*, 2 Yerg. 84; *Fowler v. Rust*, 2 A. K. Marsh. 296; *Garson v. Green*, 1 Johns. Ch. Rep. 308; *High v. Batte*, 10 Yerg. 186; *Cole v. Scot*, 2 Wash. 141; *Brown v. Gilman*, 4 Wheat. 255, 590; *Wragg's rep's. v. Comptroller General*, 2 Desau. 509; *Clark v. Hunt*, 3 J. J. Marsh. 559; *Hallock v. Smith*, 3 Barb. S. C. Rep. 267; *Woodward v. Woodward*, 7 B. Mon. Rep. 116; *Pierce v. Gates*, 7 Blackf. Rep. 162; *Budd v. Busti*, 1 Harr. Rep. 69; *Bradley v. Bosley*, 1 Barb. 125; *Brush v. Kinsley*, 14 Ohio Rep. 20; *Mayham v. Coombs*, 14 Ohio Rep. 428; *White v. Stover*, 10 Ala. Rep. 441; *Roper v. McCook*, 7 Ala. Rep. 318; *Martin v. Lundie*, 6 Ala. Rep. 427. See American Chancery Digest, by Waterman, vol. 3. p. 477.

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an insufficient security : (c) and it is also presumed that the injunction might be so extended as to restrain the cutting of underwood out of the due course of husbandry, (d) or any other similarly prejudicial act.

Judgment is a lien on unpaid purchase-money.

A judgment entered up against the vendor subsequently to the contract, and registered, is a lien upon the unpaid purchase-money. (e)

Vendor's rights, on death of purchaser without real representative before completion.

If the purchaser die, intestate and without an heir, before conveyance, it seems probable that the vendor might keep the estate and any part or the whole of the purchase-money, if paid. (f)

Tenancy of purchaser, whether determined by contract.

Where the purchase is by a tenant, either from year to year or for a longer term, the contract will not determine the tenancy, unless specially worded so as to be an absolute contract for purchase whether the vendor do or do not show a good title : (g) but equity will restrain the landlord from enforcing payment of rent pending completion. (h)

Tenancy at will determined.

A mere tenancy at will appears to be determined by the contract. (i)

Purchaser in possession, not liable for use and occupation, if no title.

It has been recently determined, that a purchaser who has been let into possession, pending discussions as to title, cannot, if the contract go off through defects in title, be sued for use and occupation ; even although the occupation may have been a beneficial one : (j) nor can he, unless he agreed to quit on some specified event which has happened, (k) be ejected without notice : (l) the above questions

[\*120]

(c) See *Humphreys v. Harrison*, 1 Jac. & W. 581; *Hippesley v. Spencer*, 5 Madd. 421; *King v. Smith*, 2 Ha. 239.

(d) *Humphreys v. Harrison*, *ubi supra*.

(e) *Prid. on Judgments*, 21.

(f) See *Sug.* 337.

(g) *Doe v. Stanion*, 1 Mee. & W. 695.

(h) *Daniels v. Davison*, 16 Ves. 253.

(i) *Sug.* 193.

(j) *Winterbottom v. Ingham*, 7 Q. B. 611; and see *Kirtland v. Pounsell*, 2 Taunt. 145, where the court seemed to attach importance to the fact of the purchaser having paid part of the purchase-money; see p. 147; but this, although it was also the case in *Winterbottom v. Ingham*, does not seem to have been there considered material.

(k) *Doe v. Sayer*, 3 Camp. 8.

(l) See 1 Mee. & W. 700; *Right v. Beard*, 13 East, 210.

should, of course, be provided for by special agreement Chapter VII. where the purchaser is let into possession before payment, or where the purchase is by a tenant: when the purchase is completed, the purchaser's title, even at law, so far relates back to the time fixed for completion, that he can maintain use and occupation against a person whom he has by mistake allowed to have the interim possession.(m)

(4.) *Rights of vendor and purchaser, inter se, not affected by death, bankruptcy, &c., of either party.*

The contract, when once entered into, will not be avoided by the death, bankruptcy, insolvency, or lunacy,(n) of both or either of the parties, even before the time fixed for completion.[1] Contract not avoided by death, bankruptcy, or insolvency.

Upon the bankruptcy of a purchaser, the vendor may require the assignees to elect whether they will abandon or perform the contract; and, if they fail so to do, may apply by petition for delivery up of the agreement and possession of the premises:(o) and if, in any case, they allow a reasonable time to elapse without requiring the contract to be performed, they will be considered to have abandoned it;(p) and the question, what is a reasonable \*time, will, in an action at law, be left to the jury:(pp) or the vendor may petition for a resale of the property, and for payment of the amount remaining due to him, and for leave to prove for the deficiency(q) (if any;) and he

[\*121]

(m) *Hull v. Vaughan*, 6 Pri. 157; and see 7 Q. B. 617.

(n) *Winged v. Lefebury*, 2 Eq. Ca. Ab. 32; *Orlebar v. Fletcher*, 1 P. Wms. 737; *Owen v. Davies*, 1 Ves. 82; *Brooke v. Hewitt*, 3 Ves. 255; Sug. 191, 192, 233; *vide infra*, Ch. XVIII.

(o) 6 Geo. IV. c. 16, s. 76; 12 & 13 Vict. c. 106, ss. 145, 146.

(p) *Lawrence v. Knowles*, 7 Sc. 381.

(pp) *S. C.*

(q) *Bowles v. Rogers*, 6 Ves. 95, n.

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[1] The principle upon which this doctrine is founded, is, that equity, regarding the substance, and not the mere forms and circumstances of agreements, and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance. See *Craig v. Leslie*, 3 Wheaton's Rep. 563.

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will be entitled to his costs, although there be no written contract, but only part performance of a parol agreement.(*r*)

(5.) *Death of vendor before completion : its effect on relative rights of his real and personal representatives, under old, and under new law.*

Purchase-money goes to personal, and interim profits to real representative.

Upon the vendor's death, the unpaid purchase-money forms part of his personal estate ;(*s*) the profits of the land from his death up to the time fixed for completion belong to his real representatives.(*t*)

Legal estate descends to heir or devisee :— conveyance of, under Statute, if no real representative. Under old law, contract revoked prior devise in equity.

If he die before conveyance, the legal estate, of course, descends on his heir or devisee; if he die without an heir, and intestate, a conveyance of the legal estate may be obtained under the provisions of the Trustee Act, 1850.(*u*)

In cases governed by the old law, as it existed before the passing of the new Wills Act,(*v*) (and which, it must be remembered, is still binding in all cases where the will has not been made or republished, &c., on or since the 1st of January, 1838,) the contract for sale, (assuming it to be binding as against the vendor,) is, in equity, a revocation of a prior devise of the property; the legal estate passes to \*the devisee, but merely as a trustee; and the purchase-money belongs to the personal estate. And even if the estate be devised in trust for sale, and then be agreed to be sold by the testator, the purchase-money will not belong to the legatees of the proceeds of sale.(*w*)

[\*122] Although devise was in trust to sell.

Relative rights of vendor's real and personal representatives, dependent on his liability to perform the contract.

In such cases, the question between the real and personal representatives seems to be this, viz., whether the vendor at the time of his death was, either absolutely or contingently, under such an agreement as equity would

(*r*) *Ex parte Cooper*, 3 Mon. De & De G. 717.

(*s*) Sug. 192; see *Lord Hatherton v. Bradburne*, 7 Jur. 1100; 13 Sim. 599: where the question was whether the consideration payable for a mining license was purchase-money or rent.

(*t*) *Lumsden v. Fraser*, 12 Sim. 263.

(*u*) 13 & 14 Vict. c. 60; or, formerly, under the 4 and 5 Will. IV. c. 23; see *Re Lowe's estate*, 2 Ph. 690.

(*v*) 1 Vict. c. 26.

(*w*) *Arnald v. Arnald*, 1 Bro. C. C. 401; *Newbold v. Roadknight*, 1 Russ. & M. 677.



enforce against him : (x) if so, the property, (as between his real and personal representatives,) forms part of his personal estate from the time fixed for completion ; whether such time be specified in the contract, or have to be determined by the occurrence of some collateral event, or depend upon the mere option of the purchaser ; (y) but, unless and until such event occur or such option be declared, the estate (in the case of intestacy) belongs to the heir, (z) or, in the case of a devise, (either after, (a) or, it is conceived, before the contract,) to the devisee, unless the contract evidence a contrary intention ; which intention is not evidenced by a special reservation of the rent and profits, until completion, in favor of the vendor, his *heirs, executors and administrators.* (b)

And it has been held that when a railway or other public company, in exercise of its compulsory power, gives due notice of its intention to take land, mere acquiescence by the purchaser in such notice, will, (unless he be *non compos*, or under some other personal disability, (c) be considered \*equivalent to a contract ; and the purchase-money will belong to his personal representatives : (d) but this appears to be open to doubt. (e)

If, at the vendor's death, there be a binding contract as against the purchaser, but no binding contract have been entered into by the vendor, the rights of his heir or devisee are, of course, unaffected.

If the contract were binding upon both parties at the time of the vendor's death, no subsequent act or matter can alter the relative rights of his representatives : (f) so that, if the purchaser subsequently act so as to lose his

Notice by railway company acquiesced in, whether equivalent to contract by owner.

[\*123]

Rights of vendor's representatives unaffected by a contract binding only on the purchaser. If contract binding on both parties at vendor's death, relative rights of his representatives are

(x) See *Knollys v. Alcock*, 7 Ves. 558 ; Sug. 213.

(y) *Lawes v. Bennett*, cited 14 Ves. 596.

(z) *Twyny v. Bedwell*, 14 Ves. 591.

(a) Sug. 204.

(b) *Shadforth v. Temple*, 10 Sim. 184.

(c) *Midland Counties Railway v. Oswin*, 1 Coll. 74, 80.

(d) *Ex parte Hawkins*, 13 Sim. 569 ; and see *Richards v. Att. Gen. of Jamaica*, 13 Jur. 197.

(e) See *Adams v. Blackwall Railway Company*, 14 Jur. 679, C.

(f) *Bennet v. Lord Tankerville*, 19 Ves. 179 ; and see *Tibbott v. Voules*, 6 Sim. 40.

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unaltered by subsequent events.

Whether, if contract is mutually rescinded before death, devisee's rights are restored.

Effect of its ceasing, during vendor's life, or to be binding on himself:

or upon the purchaser.

[\*124]

Effect of general devise upon real estate contracted to be sold;—devisee takes merely as trustee.

Specific devise, when

right under the contract, the estate belongs in equity to the next-of-kin of the vendor.(g)

If the contract (originally binding) be rescinded or abandoned by both parties in the lifetime of the vendor, there seems to be ground to contend that the rights of the devisee are restored ;(h) if, however, it were held that the devisee could not take, the heir would be entitled beneficially.

If, during the vendor's lifetime, the purchaser alone abandon the contract, or act so as to relieve the vendor from his liability to convey the estate, it seems that the property would be considered real estate at his decease ;(i) but unless the vendor have acquiesced in the vacation of the contract, there would seem to be a difficulty in maintaining the rights of the devisee against the heir ; except in cases coming within the new law.

If, during the vendor's lifetime, he himself abandon the contract, or if, through want of title or for any other \*reason, the contract, at the time of his death, be capable of being enforced only *against* and not *by* him, the right of the personal representatives would seem to depend upon whether the purchaser do or do not choose to enforce specific performance ;(j) the case being, in effect, similar to those in which the purchaser has, *ab initio*, a mere option to purchase.

A general devise, of all his real estates, by the vendor, after the contract, will, *prima facie*, and in the absence of any limitations or other matter inconsistent with such an intention, pass the legal estate in the property contracted to be sold ;(k) but, although the estate be devised expressly by name, the devisee, as a general rule, takes merely as a trustee for the purchaser, and the purchase-money forms part of the personal estate.(l)

But in a late case, where a testator devised, by *special*

(g) *Curre v. Bowyer*, 5 Beav. 6.

(h) Sug. 202 ; but the point is doubtful, see 7 Ves. 558 ; 19 Ves. 179.

(i) Sug. 213 ; 1 Jarm. on Wills, 49.

(j) See 1 Jarm. on Wills, 50.

(k) *Wall v. Bright*, 1 Jac. & W. 494.

(l) *Knollys v. Shepherd*, 1 Jac. & W. 499, cited.

*description*, lands subject to a mere option of purchase, to A. for life with remainder over, it was held that the purchase-money was subject to the same limitations as had been declared of the lands.<sup>(m)</sup>

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beneficially  
entitled.

And the law, as above stated, appears to be unaltered by the 1 Vict. c. 26;<sup>(n)</sup> which, however, removes all doubt as to the devisee's right in cases where the contract is rescinded or abandoned by the vendor, or is not binding on him; and also is in favor of the devisee's beneficial interest in cases similar to *Knollys v. Shepherd*.<sup>(o)</sup>

Effect of 1  
Vic. c. 26, on  
relative  
rights of ven-  
dor's repre-  
sentatives.

*\*(6.) Death of purchaser before completion; its effects on relative rights of his real and personal representatives, under old, and under new Law. [\*125]*

Upon the death of the purchaser before completion, the property contracted for, (assuming it to be freehold or copyhold of inheritance,) descends to his real representative, who is *prima facie* entitled to have the purchase-money paid out of the personal estate.<sup>(p)</sup>

Death of  
purchaser  
before com-  
pletion.

Here also, the question between the purchaser's real and personal representatives is this, viz.: whether at the time of his decease, he was, either absolutely or conditionally, under a binding contract to purchase; if absolutely bound, or if conditionally or optionally bound, and the condition upon which the liability was to become absolute be subsequently fulfilled, or the vendor's option to sell be declared, the real representative is entitled;<sup>(q)</sup> and his rights will not be affected by anything subsequent to the death of the purchaser; so that if by such subsequent matter (*e. g.*, the felling of ornamental timber by the vendor,) the contract cease to be binding on the purchaser's

Relative  
rights of real  
and personal  
representa-  
tives depend  
on his liabi-  
lity to per-  
form con-  
tract.

(m) *Drant v. Vause*, 1 Y. & C. C. 580; see judgment.

(n) *Farrar v. Lord Winterton*, 5 Beav. 1; *Moor v. Raisbeck*, 12 Sim. 193; *Midland Counties Railway Company v. Oswin*, 1 Coll. 74, 80; *Ex parte Hawkins*, 13 Sim. 569.

(o) *Ubi supra*; see Sug. 211.

(p) *Broome v. Monck*, 10 Ves. 597, 611.

(q) *Buckmaster v. Harrop*, 13 Ves. 456.

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representatives, his real representative is nevertheless entitled to the purchase-money.<sup>(r)</sup>

If not liable his real representatives had no claim on his personal estate.

If, however, the contract gave the purchaser a mere option, which he had not declared at the time of his decease, or if, through want of title in the vendor or any act or omission on his part, the agreement, although intended to be binding on both parties, was, at the time of the purchaser's death, binding only upon the vendor; the real representative of the purchaser has no claim upon the personal estate for the unpaid purchase-money, and a bill \*filed by him against the personal representatives and the vendor, will be dismissed ;<sup>(s)</sup> but, upon principle, it would seem that, if he chose to pay for the estate out of his own pocket, he might enforce the contract against the vendor.

[\*126]

Relative rights of heir and devisee of the purchaser under old law.

Right of devisee as against heir depended upon contract being binding on vendor.

The relative rights of the heir and devisee of the purchaser, in cases falling within the old law, seem to depend on the following rules.

A purchaser, upon entering into a contract for purchase, became entitled to dispose, by will, of his rights under the contract ;<sup>(t)</sup> [1] if, however, the contract were not, at the date of the will, binding upon the vendor, (either absolutely, or subject to a condition or option subsequently fulfilled or declared,) the purchaser had *no* enforceable rights, and his will was therefore inoperative ; and any interest subsequently acquired by him in the property descended on his heir ;<sup>(u)</sup> a clear indication, however, of the testator's intention that the devisee should take, either the particular lands, or, generally, all subsequently pur-

But will might put him to his election.

(r) 1 Jarm. on Wills, 46 ; and see the judgment in *Broome v. Monck*, 10 Ves. 597.

(s) Sug. 213 ; *Green v. Smith*, 1 Atk. 573 ; *Broome v. Monck*, 10 Ves. 597 ; *Collier v. Jenkins*, 1 You. 295.

(t) Sug. 194, 195 ; *Broome v. Monck*, *ubi supra* ; *Rose v. Cunynghame*, 11 Ves. 550 ; *Gaskarth v. Lord Lowther*, 12 Ves. 107.

(u) *Rose v. Cunynghame*, *ubi supra* ; *Duckle v. Baines*, 8 Sim. 525.

[1] An equitable interest founded upon articles of agreement for the purchase of lands, is real estate which will pass by a devise made subsequently ; and if there be no such devise, will descend to the heir, and the executor must pay the purchase-money for the benefit of the heir. *Livingston v. Newkirk*, 3 Johns. Ch. Rep. 312, 316 ; *McKinnon v. Thompson*, *Ib.*, 307, 310.

chased lands, was sufficient to put the heir to his election between the descended land and any provision made for him by the will ;(v) if, however, at the date of the will, the contract were binding as against the vendor, the purchaser's devisee became entitled to the benefit of it, (if remaining unperformed at the purchaser's decease ;) but his right to have the purchase-money paid out of the personal estate, depended, as above shown, upon the question whether the contract were binding as against the purchaser at his decease ; and, if it were so, it is conceived that the devisee would, (as against the heir,) be \*entitled, although the contract were not binding upon the purchaser at the date of the will. If the contract were performed by the vendor in the purchaser's lifetime by a conveyance to him in fee, (or, perhaps, to the common uses to bar dower in his favor, in cases where the contract was for a conveyance to him or such uses as he should appoint,(w) the devisee was entitled in equity, and the legal estate descended to the heir as his trustee : a conveyance to uses to bar dower, operated, however, as a revocation where there was either no written agreement,(x) or an agreement to convey in fee,(y) or even an agreement to convey to the purchaser, his heirs, *appointees* or assigns : (z) the doctrine, however, is disapproved of by Sir *E. Sugden*,(a) and although apparently well settled,(b) seems open to much observation.

Lands merely contracted for, passed along with lands contracted for and conveyed, under a general devise of all lands purchased by the testator ;(c) and lands recently purchased and conveyed, passed under a general devise of lands contracted for ;(d) and copyholds surrendered to

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Devisee might be entitled to estate, as against vendor and purchaser's heir, and yet not to have purchase-money paid out of personal estate.

[\*127]

Cases in which conveyance to purchaser revoked devise.

Effect of devise of lands "contracted for" and "purchased."

Will passed

(v) *Thelusson v. Woodford*, 13 Ves. 209 ; Sug. 199.

(w) Sug. 198.

(x) *Ward v. Moore*, 4 Madd. 368.

(y) *Rawlins v. Burgis*, 2 Ves. & B. 382.

(z) *Bullin v. Fletcher*, 1 Keen, 369 ; 2 M. & C. 432.

(a) Sug. 198 ; 2 Dru. & War. 497.

(b) "I cannot say I see anything like a doubt on the authorities." *Per* Lord Cottenham, 2 M. & C. 441.

(c) *Atcherly v. Vernon*, 10 Mod. 526.

(d) *St. John v. Bishop of Winton*, Cowp. 94.

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copyholds  
subsequent-  
ly surren-  
dered to use  
of will.

Effect of 1  
Vict. c. 26,  
on relative  
rights of  
heir and  
devisee of  
purchaser.

Effect,  
under old  
law, of  
purchase  
of fee by  
termor ;

[\*128]

and under  
1 Vict. c. 21.

Contract  
for sale by

the use of the copyholder's will, passed under a general devise of copyhold estates contained in a prior will and not subsequently republished.(e)

And, in cases of wills falling within the operation of the late Act, the above questions between the heir and devisee are settled in favor of the latter, by the provision which makes the devise operate upon the testator's interests as they exist at the time of his death.

\*Under the old law, upon a binding contract for purchase of the inheritance by a person possessed of a beneficial term for years, the term, although specifically bequeathed by a prior will, became attendant on the inheritance ; so that, on the death of the purchaser, even before conveyance, his legatee of the term was merely a trustee for his heir : (f) the intervention, however, of any intermediate estate, unless held in trust for the purchaser, (g) would seem to prevent the operation of the rule (h) : and the rule that the term became attendant was merely one of presumption, which might be rebutted by evidence of a contrary parol declaration by the purchaser. (i)

It seems probable that, in cases governed by the new law, a contract for purchase, if not completed by conveyance, would, in equity, defeat (as before) the rights of a party claiming the term under a general bequest ; but would not, (except in cases coming within the operation of the 8 & 9 Vict. c. 112,) affect a specific legatee of the term : but even a specific legatee would lose the benefit of the bequest, if the term were actually merged by a conveyance of a fee to the testator, or became attendant on the inheritance, or satisfied and merged under the Merger Act. (j)

(7.) *As to the effect of contract in certain special cases.*

It has been recently held, that the fact of a mortgagee,

(e) Sug. 200.

(f) *Gallon v. Hancock*, 2 Atk. 425 ; *Capel v. Girdler*, 9 Ves. 509.

(g) *Whitchurch v. Whitchurch*, 2 P. Wms. 236.

(h) *Scott v. Fenhoullert*, 1 Bro. C. C. 69 ; 9 Ves. 509.

(i) Sug. 789.

(j) Sug. 209.

with power of sale, having contracted to sell part of the mortgaged estate for a sum exceeding the amount due on the security, is no ground for restraining him from bringing an action for recovery of the mortgage note. *(k)*

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mortgagee under power :— he may yet sue for mortgage debt.

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\*When the assignee of a lease agreed to sell it, and it was stipulated that the purchaser should not be entitled to an assignment, and he entered and retained possession until the end of the term, the latter was held bound, in equity, to indemnify the original lessee, although no party to the agreement, against breaches of covenant committed during such possession. *(l)*

Agreement for purchase of lease, and possession taken; purchaser must indemnify original lessee against breaches of covenant.

Where a lessor becomes the equitable assignee of an underlease, he incurs the obligation of performing the covenants therein contained; and cannot set up their non-performance as a ground for refusing performance of a covenant in the original lease. *(m)*

Agreement by lessor for purchase of underlease; its effect

When assignees of a bankrupt contract to sell a lease, this fixes them as assignees of it, although the contract be subsequently abandoned; unless, perhaps, it be shown that it could not have been enforced. *(n)*

Agreement for sale by assignees of a bankrupt is an acceptance of a lease.

A contract for sale by a single man, was, in cases subject to the old law of dower, sufficient to exclude the claim to dower of a wife whom he married before the conveyance. *(o)* [1]

Agreement for sale excluded dower of after-taken wife.

*(k)* *Willes v. Levett*, 1 De G. & S. 392.

*(l)* *Close v. Wilberforce*, 1 Beav. 112; see *Moore v. Gregg*, 2 Ph. 717, 725.

*(m)* *Jenkins v. Portman*, 1 Ke. 435.

*(n)* *Hastings v. Wilson*, Holt's N. P. C. 290.

*(o)* *Lloyd v. Lloyd*, 2 Con. & L. 592.

[1] Where a bachelor, seized in fee of lands, prior to the year 1760, contracted to sell them, received part or whole of the purchase-money, delivered possession to the purchaser without making a deed, and having afterward married and died; quere, whether his widow, having had notice before the marriage, of the purchaser's possession, is entitled to dower of such lands? *Braxton v. Lee's heirs*, 4 Hen. & Munf. 376.

According to the principles of the common law, the wife was entitled to dower in those lands only of which the husband had the legal title. The act respecting conveyances gives her a right to dower when the husband has an estate or inheritance in the use or trust. *Herron v. Williamson*, Litt. Sel. Cas. 250.

## \*CHAPTER VIII.

## AS TO THE ABSTRACT.

1. *General matters relating to the abstract.*
2. *When perfect ;—what it must contain and show.*
3. *What should be furnished, in various specified cases.*
4. *As to its preparation, contents, and delivery.*
5. *As to its examination and perusal.*
6. *As to its verification.*

Purchaser's  
right to  
abstract.

(1) A PURCHASER may require to be furnished with an abstract prepared in the usual way, (a) even although he

(a) *Horne v. Wingfield*, 3 Sc. N. R. 340; Sug. 431.

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Whether, where the husband holds a bond or other written contract for a conveyance, the wife is entitled to dower, is an unsettled and difficult question. *Ib.*

A verbal promise of conveyance, made to the husband, will not entitle the wife to dower. *Ib.*

In this country, the law relative to dower is somewhat varied by statute in the different states. As the wife's inchoate title is an incumbrance upon the land, it is usual for the purchaser to require a release of her right, upon any sale made by the husband; which is generally done by her joining with him in the deed, with apt words for that purpose. The claim of dower attaching upon all lands whereof the husband was seized at any time during the coverture, is, in fact, of little or no use, unless the husband dies seized; for it is in practice almost universally extinguished by the act of the wife, in concurrence with the husband, upon sales and mortgages of real estate. And since the existence of the title only serves to increase the expense and multiply the forms of alienation, in several of the States, the title to dower is restricted to lands of which the husband died seized. Such is the law of Vermont, New Hampshire, Tennessee, North Carolina, Connecticut, and Georgia. In South Carolina, the real estate of an intestate is distributed, one-third to the widow in fee, and the residue to his children; and if the intestate leaves no lineal descendants, nor lineal ancestor, nor brother or sister of the whole blood, or their children, nor brother or sister of the half blood, his widow takes two-thirds of the real estate in fee, and, in all other cases, she takes a moiety. In Ohio, the widow is dowable, not only of her husband's legal estates of inherit-



have agreed to accept the title:(b)[1] he may retain it, during negotiations upon, and even after rejection of, the

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His right to retain.

(b) *Morris v. Kearsley*, 2 Y. & C. 139.

[1] "Formerly," says Sugden, "the title deeds themselves were delivered to the purchaser, and his solicitor prepared the abstract at his expense, and the abstract was compared with the title deeds by the counsel before whom it was laid. But the seller's solicitor now prepares the abstract at his expense, and the purchaser's solicitor examines the abstract with the deeds, at the purchaser's expense. And a purchaser may insist upon an abstract, and is not bound to wade through the deeds." Sug. on Vend. vol. 2, p. 39.

ance, but also of one-third part of all the right, title, or interest that her husband, at the time of his decease, had in any lands and tenements, held by bond, article, lease, or other evidence of claim. But she is held not dowerable of an equitable estate which the husband, in good faith, has aliened;—nor of lands purchased by him in his own name, with moneys entrusted to him by another. In Georgia, the widow and children of an intestate inherit his estate in equal shares; and if he dies without issue, she inherits the whole. And in all cases, the widow is bound, within one year from the death of her husband, to elect whether she will take under the will, if any, or the statute of distributions, if there is no will, or will claim her dower; and if she does not so elect, she will be presumed to have claimed her dower. In Missouri, the common law right of dower is extended to leasehold estates for a term of twenty years or more. In Mississippi, if there are no children, nor their issue, the widow has one-half of the land. So in Vermont, Alabama, Arkansas, and Illinois. In Pennsylvania, instead of dower, the widow is admitted to her distributive share of the estate among the heirs; and if the intestate left issue, she takes one-third of the real estate for her life; if no issue, she takes half, in the like manner; and in default of known heirs or kindred, she inherits the whole estate absolutely and forever. In Indiana, the widow of an intestate, in lieu of dower, may, in certain cases, take in fee, as an heir; but subject to the claims of his creditors; her share being one-third or one-half, or the whole, according to the circumstances stated in the statute. In Maine, New Hampshire, and Massachusetts, the widow is not dowerable of land in a wild state, unconnected with any cultivated farm, on the principle that the land would be wholly useless to her, if she did not improve it; and if she did, she would expose herself to disputes with the heir, and to forfeiture of the estate for waste. If such land should be sold by the husband during coverture, and subdued and cultivated by the purchaser, before the husband's death, yet the widow has no right to dower in it, on the principle that the husband was never seized of any estate in the land of which the widow could be endowed. In Pennsylvania, the title to dower does not apply to lands of the husband sold on judicial process, before or after the husband's death, nor to lands sold under a mortgage executed by the husband alone during coverture. In Tennessee, the restriction upon

title, until the dispute be finally settled, for the purpose of showing the grounds of such rejection ;(c) and, in the

(c) 2 Taunt. 278 ; Sug. 447.

the widow's dower is substantially the same ; and in Missouri it would seem to be subject generally to the husband's debts ; whereas, in North Carolina and Indiana, the widow's dower is declared by statute to be paramount to the claims of creditors. See 4 Kent, 42 ; 1 Greenl. Cruise, 165, 166, *Note*.

"It is well settled in the English cases," says Kent, (4 Kent Com. 43,) "that the wife of a *cestui que trust* is not dowable in equity out of a trust estate, though the husband is entitled to his curtesy in such an estate. A widow is consequently not dowable in her husband's equity of redemption ; and this anomalous distinction is still preserved in the English law, from the necessity of giving security to title by permanent rules. This policy outweighs the consideration that would naturally be due to consistency of principle. Sir Joseph Jekyll, in *Bank v. Sutton*, 2 P. Wm. Rep. 700, held, that the widow might be endowed of an equity of redemption, though the mortgage in fee was executed before marriage, upon her paying the third of the mortgage money, or keeping down a third of the interest. But the reasoning of that learned judge did not prevail to establish his doctrine, and the distinction which he suggested between the case of a trust created by the husband himself, and a trust estate which descended upon, or was limited to him, has been condemned by his successors as loose and unsound. The same rule prevails as to an equity of redemption in an estate mortgaged in fee by the husband before marriage, and not redeemed at his death. In these United States, the equity of the wife's claim has met with a more gracious reception ; and in Massachusetts, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, Tennessee, Alabama, Mississippi, Indiana, and probably in most or all of the other States, the wife is held dowable of an equity of redemption. Though the wife joins with the husband in the mortgage, and though the husband should afterwards release the equity, the wife will be entitled, at his death, to her dower in the lands subject to the mortgage ; and if they are sold under the mortgage, then to her claim as for dower, in the surplus proceeds, if any there should be. If, however, the mortgage was executed on a purchase before the marriage, and the husband releases the equity after the marriage, his wife's right of dower is entirely gone ; for it never attached, as the mortgage was executed immediately on receiving the purchaser's deed. In the cases of *Harrison v. Eldridge*, 2 Halst. Rep. 392, and *Barker v. Parker*, 17 Mass. Rep. 564, the wife's interest in the equity of redemption, in a mortgage executed by her and her husband, was held not to be sold by a sale of her husband's equity, under an execution at law against him only ; and the purchaser at the sheriff's sale took the land subject to the widow's dower. These cases present a strong instance of the security afforded to the wife's dower in the equitable estate of her husband. But if the mortgagee, in such a case, enters under a foreclosure, or after the forfeiture of the estate, and by virtue of his rights

interim, he maintain trover for it, even against the vendor: (d) when the contract is finally abandoned by

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Must be given up, if contract abandoned.

(d) *Roberts v. Wyatt*, 2 Taunt. 268.

as mortgagee, the wife's dower must yield to his superior title; for as against the title under the mortgage, the widow has no right of dower, and the equity of redemption is entirely subordinate to that title. The wife's dower in an equity of redemption only applies in case of redemption of the encumbrance, by the husband or his representatives, and not when the equity of redemption is released to the mortgagee, or conveyed. The reason of the American rule giving dower in equities of redemption is, that the mortgagor, so long as the mortgagee does not exert his right of entry or foreclosure, is regarded as being legally as well as equitably seized in respect to all the world but the mortgagee and his assigns. Even in the view of the English courts of equity, the owner of the equity of redemption is the owner of the land, and the mortgage is regarded as personal assets. The rule in several of the states is carried to the extent of giving to the wife her dower in all trust estates. This is said to be the law in New-Jersey, Pennsylvania, Maryland, Virginia, Kentucky, Mississippi, Ohio, Illinois and Alabama; but the rule in those states must be understood to be limited in the case of trusts in which the husband took a beneficial interest. It could not be applied to trust estates in which the husband was seized in fee of the dry technical title, by way of trust or power for the sole interest of others. In all the other states except those which have been mentioned, and except Louisiana, where the rights of married women are regulated by the civil law, and except also Georgia, where tenancy in dower is said to be abolished, the strict English rule on the subject of trust estates, is presumed to prevail. Though the wife be dowable of an equity of redemption, she is, after her husband's death, if she claims her dower, bound to contribute rateably towards the redemption of the mortgage. If the heir redeems, she contributes by paying, during life, to the heir, one-third of the interest on the amount of the mortgage debt paid by him, or else a gross sum, amounting to the value of such an annuity. In England, the widow entitled to dower in an equity of redemption in a mortgage for years, has also, upon the same principles applicable to that analogous case, the right to redeem, by paying her proportion of the mortgage debt, and to hold over until she is reimbursed. As to the interest of a widow of a mortgagee, the case and the principles applying to it, are different. A mortgage before foreclosure, is regarded by the courts of this country, for most purposes, as a chattel interest; and it is doubted whether the wife of the mortgagee who dies before foreclosure, or entry on the part of her husband, though after the technical forfeiture of the mortgage at law, by non-payment at the day, be now, even at law, entitled to dower in the mortgaged estate. The better opinion is, that she would not be entitled, as against the mortgagor. The New-York Revised Statutes have settled this question in New-York, by declaring that a widow shall not be endowed of lands conveyed to her husband by way of mortgage, unless he acquired an absolute estate therein, during the marriage."

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both parties, he must return the abstract, and may not retain any copy of it; (e) counsel's opinions and observations he may, it appears, retain if written upon separate paper; (f) or, if written upon the abstract itself, he may erase them before returning it. (g) [1]

Vendor  
pays for.  
[\*131]  
Except on  
sales to  
railway  
company,  
&c.

The vendor, as a general rule, pays for the abstract; (h) \*but on sales to a company under the provisions of the Lands Clauses Consolidation Act, 1845, whether such sales be voluntary or compulsory, and whether made by absolute or merely statutory owners, the costs of the abstract (in the absence of agreement) are thrown on the company; (i) and similar provisions (j) are contained in most of the earlier railway and other similar acts.

(2.) *As to when the abstract is perfect;—what it must contain and show.*

When  
"perfect,"  
within  
meaning of  
conditions  
of sale.

For the purpose of conditions, &c., as to time, an abstract is said to be "perfect," if it be as perfect an abstract as the vendor is able to furnish at the time of delivery, (k) although the title shown by it may be defective: an abstract is, in the stricter sense of the term, "perfect" or

When  
"perfect,"  
as showing  
a sufficient  
title.

(e) 2 Taunt. 277.

(f) 2 Taunt. 270; but see Sug. 447.

(g) *Wood v. Court*, 2 S. Atk. Conv. 463.

(h) Sug. 431.

(i) 7 & 8 Vict. c. 18, s. 82.

(j) See *In re London and Greenwich Railway Company*, 3 Ha. 22.

(k) 2 Ha. 111; and see, at Law, *Blackburn v. Smith*, 2 Exch. 783.

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[1] "As to the general property in the abstract," says Sugden, "it is hard to say who may have it; while the contract is open, it is neither in the vendor nor in the vendee absolutely; but if the sale goes on, it is the property of the vendee; if the sale is broken off it is the property of the vendor. In the mean time, the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled for his own justification, in order to show on what ground he did reject the title. If the purchase go off, not only is the abstract to be returned but no copy to be kept, lest it should be used for a mischievous purpose; and although the purchaser pays for the opinion yet, for the same reason, that ought, it should seem, be returned with the abstract." Sug. on Vend. vol. 2, p. 53, 54.

complete, when it shows a perfect title ;(*l*) that is, when Chap. VIII.  
it shows that the vendor is either himself competent to convey to, or can otherwise procure to be vested in, the purchaser, the legal and equitable estates free from incumbrances.(*m*)

For instance, the non-registration of deeds, which can be registered,(*n*) the existence of incumbrances, when the incumbrancers can be compelled to receive their money and join in the conveyance,(*o*) the legal estate being outstanding in a married woman, whose interest is bound by an order of the Court of Chancery,(*p*) are not imperfections of title.[1] Certain imperfections in, not considered defects of title.

\*But consistently with the terms of the above proposition, where vendors cannot give to or procure for the purchaser, a valid discharge for the purchase money, the title is defective.(*q*) [\*132]

(*l*) 2 Ha. 111; Sug. 445.

(*m*) See and consider, *Lord Braybrooke v. Inskip*, 8 Ves. 436, and other cases cited, Sug. 445.

(*n*) Sug. 446.

(*o*) *Ibid.*: *Townsend v. Champenown*, 1 Yo. & J. 449; and see 2 Moll. 583; but not if their concurrence cannot be compelled; see *Page v. Adam*, 4 Beav. 269.

(*p*) *Jumpson v. Pitchers*, 1 Coll. 13.

(*q*) *Forbes v. Peacock*, 12 Sim. 528.

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[1] The abstract ought to mention every incumbrance whatever, affecting the estate, and should therefore contain an account of every judgment, by which it is affected; but equity considers it complete whenever it appears, that, upon certain acts done, the legal and equitable estates will be in the purchaser which may be long before the title can be completed. Although the estate is sold free from incumbrances and the abstract shows an amount of incumbrance exceeding the purchase money, yet it must be considered that the seller can make a good title; nor can any objection be made on the ground of an incumbrance where the incumbrancer may be brought in and be compelled to join in the conveyance, nor to the want of registry of any deed for where there is no other, subsequent purchaser who has registered his conveyance, the objection is capable of being removed at any time before the completion of the purchase, but of course, the objection must be removed in due time. This rule is properly confined to cases where the seller, and persons who are trustees for him, can make a title; for if the concurrence of a stranger is necessary, and he is not bound to join the abstract cannot be deemed perfect until it shows that he has given perfection to the title. See 1 Sug. on Vend. 52.

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Should state written consent of parties agreeing to join in sale.

And this is not always sufficient

Must show where outstanding legal estate is vested.

Showing future right to property, insufficient at law;  
*semble*,

As in case of mortgage which cannot be discharged.

[\*133]

Incumbrances; whether a defect in title in equity.

And the mere statement on the face of the abstract that a party who is not compellable has agreed to join, although usual, is, of course, insufficient; a written agreement to concur should, in strictness, be procured and abstracted: nor is such agreement sufficient, if it do not absolutely bind the interest of the party signing it; *e. g.*, a title dependent on an agreement by a tenant in tail to suffer a recovery, or execute a disentailing deed, would be imperfect.(*r*)

So, if the legal estate be outstanding, the abstract must show in whom it is vested;(*s*) the existence of the rule appears to be recognized in the judgment in *Avarne v. Brown*,(*t*) although the court, upon the case before it, came to an apparently contradictory decision; but the reporter's note(*u*) seems to intimate that there was some misapprehension as to the facts.

The expression used by Lord Eldon(*v*) is, that the abstract is complete, "whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser;" it is, however, conceived that, at least in a Court of Law, it would not be sufficient for the abstract to show merely a future, (although certain and early,) right to the property; for instance, the existence of an incumbrance which cannot be discharged on or before the time fixed for completion,(*w*) would, it is conceived, amount at \*law to a defect of title: in equity, as a general rule, mortgages and other incumbrances are considered merely matters of conveyance;(*x*) and this doctrine has even been extended to cases where the property was mortgaged to an amount considerably exceeding its value;(*y*) they

(*r*) *Levin v. Guest*, 1 Russ. 325; 3 & 4 Will. IV. c. 74, s. 47.

(*s*) *Wynne v. Griffith*, 1 Russ. 2.

(*t*) 14 Sim. 303.

(*u*) See p. 308.

(*v*) 8 Ves. 436.

(*w*) See (a case depending on the specialty of the contract) *Foster v. Hoggart*, 14 Jur. 757. A mortgagee, we may remark, need not receive his money before the day fixed for redemption, although previously tendered with interest up to such day; *Brown v. Cole*, 14 Sim. 427.

(*x*) *Townsend v. Champernown*, 1 You. & J. 449.

(*y*) *Stephen v. Guppy*, and *Rawson v. Tasburgh*, cited 1 You. & J. 450.

seem, however, to have been decided on the principle that the vendor had the legal power, if he used the necessary means, of procuring a conveyance; and the conclusion would, it is conceived, be different, if, by reason of an agreement for the continuance of the charge, or otherwise, the vendor had no right to call on the incumbrancer to join in the conveyance.<sup>(z)</sup> Lord Langdale observes, on the general question, "Where an interest is vested in a party to secure a right, the satisfaction of which right entitles the party who has sold the estate to call for a conveyance, then the court considers it a question of conveyance only; but I think it has never gone further than that":<sup>(a)</sup> in which it seems to be assumed that the right is capable of being satisfied at the time when the question of title or no title arises. At any rate it may be considered that the title is perfect, whenever it appears that under the contract the purchaser either already has, or will necessarily, before the time fixed for completion, be able to acquire an immediate and indisputable right to the legal and equitable estates; even although the absence of parties, or other circumstances, may considerably delay the conveyance.

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Title good although immediate conveyance not procurable.

It has, in fact, been held, that a good title was deduced, when it appeared by the abstract that the vendor was tenant in tail in possession and able to convey the fee simple by an enrolled conveyance:<sup>(b)</sup> this decision, so far \*as it may tend to establish that such a vendor is not bound at once to execute a disentailing assurance and limit the fee simple either to his own use or to his appointment, seems open to observation; it is clear that his contract would give to the purchaser no right which he could enforce in the event of the vendor's death before the execution of the conveyance; which sufficiently distinguishes it from the case put by the plaintiff's counsel, of a contract entered into by a tenant for life with a power of sale: for a contract to exercise such a power, if entered into for valuable consideration, would be enforced in equity against

Whether sufficient if abstract merely show that vendor is tenant in tail in possession.

[\*134]

(z) See 2 Moll. 583, 4 Beav. 269.

(a) *Sidebotham v. Barrington*, 3 Beav. 528.

(b) *Cattell v. Corral*, 4 Y. & C. Ex. 228.

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remaindermen ;(c) whereas, in the case of the tenant in tail, the jurisdiction of equity is expressly excluded by statute (d) and it is evidently unreasonable that a purchaser should be put to the expense of investigating the title and preparing his conveyance, when the death of the vendor would deprive him of the estate, and possibly leave him without available remedy for recovery of his costs, and deposit (if any has been paid.)

(3.) *As to what abstract should be furnished in various cases.*

As to what abstract should be furnished in certain cases, on purchase by a tenant in common or a copartner. On purchase of allotment.

If one tenant in common purchase of another, he is entitled to an abstract of their general title ;(e) the rule, however, may perhaps be different in the case of a partner purchasing his co-partner's share of the partnership leasehold premises.(f)[1]

[\*135]

Of land taken in exchange.

Upon the sale of lands allotted under an Inclosure Act, the abstract, down to the award, must be that of the title to the lands in respect of which the allotment was made ;(g) when the allotment has been made indiscriminately \*in respect of lands held under different titles, all such titles must be shown by the abstract.(h)

Where the estate has been taken in exchange at common law or under mutual conveyances with eviction clauses, the abstract must, down to the exchange, show the

(c) 2 Sug. Pow. 118.

(d) 3 and 4 Will. IV. c. 74, s. 47.

(e) *Morris v. Kearsley*, 2 Y. & C. 139.

(f) *Law v. Law*, 9 Jur. 745.

(g) Sug. 432.

(h) See and consider *King v. Moody*, 2 St. 579.

[1] If two persons be tenants in common, and hold under the same title, as in the case of partners buying real property, or holding such property bought by one of them, a contract to sell by the representatives of the one, to the survivor, with a stipulation that the sellers should deliver to the purchaser at at their own expense "an abstract of their title," means an abstract of the *general* title, and it is not to be confined to the acts of the deceased partner, and the title under him, although the purchaser was bound by the contract to purchase subject to all imperfections of title before the commencement of the title of the deceased partner ; so that a man may be entitled to an abstract of the title, and yet be compelled to accept the title itself as it stands. See Sug. on Vend. vol. 2, p. 53.



titles to both estates; (i) unless, in the case of a common-law exchange, (as to the future operation of which see 8 and 9 Vict. c. 106, s. 4,) the estate given in exchange has since been aliened, (j) and the vendor can prove the alienation.

Where the estate has been taken in exchange under the acts authorizing the exchange of ecclesiastical property, (k) or under an Inclosure Act, or the provisions of the 4 & 5 Will. IV. c. 30, (authorizing the exchange of common lands,) the title down to the exchange must be that of the estate given in exchange: Sir *E. Sugden*, in fact, (speaking of exchanges under Inclosure Acts,) states, that "the title of the person holding the estate is the only one relating to it"; (l) this may be admitted if the validity of the exchange be assumed: but, as such exchanges, and also exchanges of common-field lands under the 4 & 5 Will. IV. c. 30, are only authorized to be made by or with the consent in writing of persons having certain specified interests in both estates, (m) it is conceived, that in such cases an abstract can scarcely be regarded as perfect, \*unless it disclose at least so much of the prior title to the estate taken in exchange as may be sufficient to show that the transaction was within the provisions of the act: but where the estate has been taken in exchange under the Common Inclosure Act, 8 & 9 Vict. c. 118, the single title alone seems necessary; as the act contains a provision making the award, when confirmed, conclusive evidence that the

Of land taken in exchange from the Church or under Inclosure Act.

[\*136]

(i) Sug. 432.

(j) 1 Jarm. Conv. by S. 75.

(k) 66 Geo. III. c. 147, see s. 3; and 56 Geo. III. c. 52; and 1 Geo. IV. c. 6. See, as to confirmation of void exchanges, by the tithe commutation commissioners, 5 and 6 Vict. c. 54. s. 7.

(l) Page 432.

(m) See 4 and 5 Will. IV. c. 30, ss. 2, 4, and 25, in which, note the words, "according to the provisions," &c.; and 6 and 7 Will. IV. c. 115, s. 35. See also 3 and 4 Vict. c. 31, s. 1, which, in cases falling within the act, makes the award conclusive evidence that the provisions of the general Inclosure Act, and of the 6 and 7 Will. IV. c. 115, have been complied with, and that all necessary consents have been given: but, query, whether this meets the difficulty in the case of an exchange; it would rather seem to refer merely to such consents as are requisite to the validity of the Inclosure.

Chap. VIII. directions of the act have been complied with, and declaring that every allotment, *exchange*, &c., specified and set forth in the award, shall be binding and conclusive on all persons whomsoever.(n) So, also, if the title be described in the particulars or conditions as arising under an exchange by virtue of an award under an Inclosure Act, it is sufficient if the abstract show a title by award in respect of other lands and common rights, without showing the particulars of the exchange; and if the agreement be that the title shall commence with the award, the purchaser cannot require the title of the lands given in exchange for those contracted to be sold.(o)

Of land  
taken in  
exchange  
from a  
charity.

Where the title depends upon an exchange under the 1 & 2 Geo. IV. c. 92, (authorizing the exchange of charity lands,) the abstract must show the title as well to the lands given as to the lands taken in exchange; inasmuch as the right of re-entry in case of eviction is expressly reserved to the charity trustees;(p) and it is conceived, that the purchaser may require evidence of the land given in exchange having been quietly enjoyed by the charity.

Of estate  
which has  
attendant  
terms.

[\*137]

The title to terms of years attendant upon the inheritance, and which are considered to have merged under the 8 & 9 Vict. c. 112, must still be traced so as to show in whom they were vested at the time when they became \*subject to the operation of the act; viz.: by abstracting, if practicable, the deed creating the term, and the mesne assignments: these latter, however, may be abstracted very concisely:(q) the act, it may be remarked, does not appear to extend to copyholds, or customary freeholds:(r) and it seems doubtful whether the first and second sections extend to any hereditaments other than *land* technically so called.(s)

Of enfranchised copyholds.

Upon a sale of land formerly copyhold, the abstract must trace the copyhold title, and also the lord's title to

(n) Sect. 105; and see, as to partitions by the commissioners, 11 and 12 Vict. c. 99, ss. 13, 14.

(o) *Cattell v. Corral*, 4 Y. and C. Ex. 228.

(p) See. sect. 9 of Act.

(q) Sug. 436.

(r) See Dav. Concise Prec. 79.

(s) *Ibid.* 75, 79.

the manor, down to the enfranchisement;(*t*) and it is said that a purchaser may further require evidence of the manor having, since the enfranchisement, been enjoyed conformably with the title shown by the abstract.(*u*)

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Upon a sale of leaseholds, the abstract must, (except in the case of a bishop's lease,)(*v*) show the lessor's title, as well as the subsequent title to the term;(w) even although the lessors were a corporation, and the lease be one of long standing;(x) the decision, as to the non-production of the bishop's title,(y) was on the ground of the lease having been granted in a mode prescribed by an act of parliament, and upon the presumed notoriety arising from the use of the episcopal seal; and would seem to apply to leases granted by a dean and chapter, and possibly to other cases: and the general rule does not apply when the purchaser enters into the contract with notice that the freehold title cannot be produced;(z) nor does it appear clear that the rule applies where, on the sale of a lease of "great antiquity, the vendor shows the creation of the term, and deduces the leasehold title for the last sixty years.(a) Where, however, the purchaser can require the lessor's title, it would appear, upon principle, that he might also require evidence of the freehold having been, since the demise, enjoyed conformably with the earlier title.

Of leaseholds—freehold title must be produced.

[\*138]

Upon a sale of renewable leaseholds, if, (as generally happens,) the subsisting lease be expressed to be granted in consideration of the surrender of the prior lease, the abstract must show that the surrenderor was the equi-

Of renewable leaseholds.

(*t*) Sug. 433: but as to cases where the enfranchisement has been under the general act, 4 and 5 Vict. c. 35, see s. 64 of Act; *et quære*.

(*u*) 1 Jarm. Conv. by S. 83.

(*v*) *Fane v. Spencer*, 2 Mer. 430.

(*w*) *Soutter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 Man. & Gr. 410; Sug. 492.

(*x*) *Purvis v. Rayer*, 9 Pri. 488; see p. 522.

(*y*) *Fane v. Spencer*, 2 Mer. 430.

(*z*) Sug. 493.

(*a*) 1 Jarm. Conv. by S. 69.

Chap. VIII. table as well as the legal owner of the surrendered lease.(b)

Of leases for lives. If the lease be held for lives, evidence must, of course, be given, that the lives are in existence; and this, although there be a covenant for perpetual renewal.(c)

Of shares in mines. Upon a sale of shares in mines, the purchaser is not entitled to a regular abstract of title to the mines themselves, as if he were purchasing a share in the land in which they are worked, but he is entitled to such evidence of the constitution of the company, and of the nature of the title under which the mines are worked, as will show that the subject-matter of the purchase is what it professes to be, and that the proposed form of transfer will give him a valid title to the shares.(d)

Of pews. Upon the sale of a messuage with pews claimed as appurtenant thereto, the right to the pews must be proved, either by the grant from the ordinary, or by evidence of prescription.(e)

Must extend over what period—sixty years. As to the commencement of the title,—upon a sale of freeholds, or (it is conceived) of copyholds or renewable leaseholds, the title must go back at least sixty years.(f)

[\*139] One hundred years on sale of advowson. \*The title to an advowson must be carried back at least one hundred years;(g) and the abstract should be accompanied by a list of the presentations during the period over which it extends;(h) the rule, it is conceived, is the same, whether the advowson be sold as in gross or appendant; for, although a sixty years' title might be sufficient, if it could be shown that the advowson was in fact appendant to the principal estate, yet the purchaser, it may be contended, has a right to see that no severance of the appendancy is disclosed by the earlier title.

Must show creation of Upon the sale of a reversionary interest, whatever may

(b) *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Hodgkinson v. Cooper*, 9 Beav. 304.

(c) *Anderson v. Higgins*, 1 J. & L. 718.

(d) *Curling v. Flight*, 2 Ph. 613; see 6 Ha. 41.

(e) As to which see a late case of *Pepper v. Barnard*, 7 Jur. 1128; 12 L. J., N. S. Q. B. 361.

(f) *Cooper v. Emery*, 1 Ph. 368; *Hodgkinson v. Cooper*, *ubi supra*.

(g) See 3 and 4 Will. IV. c. 27, s. 30.

(h) Sug. 487.

be its antiquity, the abstract must go back sufficiently far to show its creation ; and should also show that the estate has been enjoyed in possession, conformably with the instrument which created the reversionary interest : (i) this, however, only applies to the sale of reversionary interests commonly so called, and not to the sale of an estate subject to an attendant term ; in such a case it is sufficient to show a good sixty years' title to the freehold, and to the possession of the term, abstracting also the deed creating the term ; and even if this be lost, the loss is said to be immaterial. (j)

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reversionary interest on sale thereof.

Upon the sale of an old term of years, it is sufficient if the abstract show the creation of the term and a sixty years' title to the possession, omitting the intermediate title ; nor will the absence of the deed creating the term render the title unmarketable. (k)

Showing sixty years' title to old term—whether sufficient.

Upon the sale of tithes held as a lay property, or of any other property held, (as such tithes *must* be,) under a grant from the crown, the abstract should set forth the original grant, and then, omitting intermediate instruments, take 'up the history so as to show a good sixty years' title ; (l) so, where the tithes are considered to have been merged by the tithe-owner under the late acts, and the estate is sold as tithe-free, the early title to the tithes must be similarly deduced. (m)

On sale of tithes or other property derived from the crown must show original grant.

[\*140]

If the purchaser have agreed not to call for the legal estate, this will not shorten the period over which a title must be shown to the equitable estate : and it must also be shown that no adverse use can be made of the legal estate. (n)

Rules not altered by the estate being merely equitable.

(4.) *As to the preparation, contents, and delivery of the abstract.*

The abstract must always commence with a document, Must, if possible, com-

(i) 1 Jarm. Conv. by S. 61.

(j) 1 Prest. Abst. 249.

(k) 1 Jarm. Conn. by S. 69 ; 1 Prest. Abst. 25, 249.

(l) 1 Jarm. Conv. by S. 68 ; Sug. 487.

(m) *Ibid.*

(n) Sug. 495.

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mence with  
a document;  
old deeds not  
to be ab-  
stracted:

but must be  
produced if  
in vendor's  
possession.

of at least the requisite age, if the vendor have one ;(o) but neither can a purchaser require, nor would the vendor's solicitor be justified in furnishing an abstract of deeds prior in date to that which would constitute a good root of title :(p) the purchaser, however, may require the *production* of every document in the vendor's possession, however ancient.(q)[1]

(o) 2 Sug. V. and P. 138, 10th ed.

(p) Sug. 432.

(q) 1 Jarm. Conv. by S. 63.

[1] In making a brief of title, the practitioner should be careful to place every deed and other paper in chronological order. The date of each deed, the names of the parties, the consideration, the description of the property, should be particularly noticed, and all covenants should also be particularly inserted.

Sugden gives, in substance, the following directions:—

Every abstract should state, in the heading, whose title it is, and for what interest. The solicitor should abstract every document upon which the title depends, or upon which any difficulty has arisen. Wherever he begins at the root of the title, he ought to abstract every subsequent deed, and if he were to suppress any, by which the purchaser should be damaged, he would be answerable for the loss. Where an estate has been purchased in parcels, under different titles, every title should, of course, be treated separately, until they all unite in one common title. The parties should be stated, with their descriptions, shortly, if deemed necessary. Recitals should be introduced as such, where they occur, and not as substantive statements of fact. The deed, etc., already abstracted, may be stated to be recited, but an abstract of the recitals could not be justified. The witnessing part is always introduced as such. It should state the consideration and the motive or object of the parties, where that is set forth. The granting part should be stated in the very words, but of course, not repeating them; and, the exact words used in conveying the estate unto the grantee, etc., should be stated. The parcels should be stated accurately, but not at unnecessary length; and they should, in subsequent instruments, only be referred to, unless a new or some additional description is introduced, which should be stated. An exception in the deed relating to the property sold should, of course, be abstracted. The habendum should be stated in the very words as regards the grantee, his heirs, etc., or unto, and to the use of him, etc. Upon this point, the person abstracting should not exercise his judgment, but copy the words. The limitations and uses should be accurately stated. Where the common words are accurately introduced, the effect of them only should be stated. If there are trusts, they should be stated, with all the conditions and requisitions attached to them, unless they never arose—in which case, the fact should be stated, and the trusts simply referred to. Powers should be stated shortly, unless they have been exercised, as in the case of a power

As a general rule, the first abstracted documents should purport to deal with the entire legal and equitable estates in the property, or should at least afford *prima facie* evidence that the title to such legal and equitable estates was, at the date of such documents, consistent with the title as subsequently deduced: they should not be dependent for their validity upon any previous instrument: and should contain nothing raising a fair doubt whether the parties claiming the interests there purported to be dealt with, were in fact entitled so to deal with them.

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Must commence with what description of document as a root of title.

\*Thus, a general devise in a will of real estate is an insufficient root of title; there being nothing to show that the property in question was intended to, or could, have passed by it; the conveyance to the testator should be abstracted; or, if there are no earlier deeds, evidence should be furnished of his seisin at the date of his will: and even a specific devise is not an eligible root of title.

[\*141]

Not with will containing general devise.

Thus also, it is conceived, a mortgage for a term of years, or a lease, is an improper commencement of an abstract of title to the fee simple, where the vendor has earlier documents; unless, perhaps, in cases where, independently of the mere fact of the demise, (which might be

Whether with mortgage for a term—or a lease.

---

of sale and exchange, or power to appoint new trustees, the material parts of which should be stated where it has been executed. A power to lease seldom requires to be more than referred to. So, powers to trustees to give receipts need only be stated in those words, unless where the purchaser is to pay his money under that authority. Where there is such a power, the trusts of the money are not to be stated, or only shortly. The usual covenants—for example, the common covenants for title—should be referred to as such; but, any special matter should be abstracted. Where a receipt is endorsed, that should be stated, and by whom it is signed. In cases of intestacy of freehold estates, it is desirable to state how the intestacy is proved, as for example, by letters of administration, which are the best proof. And generally, all the evidence in support of facts recited or stated, should be referred to. In abstracting wills, where the usual technical terms are not used, it is necessary to state the exact terms of the devise, and all modifications of it, by proviso or otherwise, should be accurately stated. No particular directions can be given as to decrees. The nature of the question will point out whether it is necessary to do more than abstract the data, parties, and declaratory part of the decree. Where there is a reference to the master important to the title, the result should be stated, with the order or decree, on further direction.

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attributed to a power, or to a mere chattel interest in the grantor,) the instrument contains matter which furnishes a fair presumption that he was the absolute owner in fee. A vendor, however, in possession of earlier documents, could not be advised, (except under very special circumstances,) to commence his abstract with a lease; as it would almost inevitably lead to expensive discussions with the purchaser. And where a lease is relied on, it is necessary, unless it expired before the time of living memory, to show that the lessee had actual possession of the estate (*r*)

Nor with instrument dependent for its validity on previous instrument.

Thus also, an instrument relied upon as an exercise of a power should be preceded by the instrument creating the power; and the admittance to copyholds should be preceded by the surrender; and a recovery deed by the deed creating the entail. (*s*)

Except in certain cases—loss of prior instrument.

[\*142]

Nor with document which throws a doubt on earlier title.

"If, however, such deed is lost, and possession has gone along with the estates created by the recovery for a considerable length of time, and the presumption is in favor of the recovery having been duly suffered," the loss of the deed, and want of evidence of its contents, are no objection \*to the title, (*t*) and the same principle would probably apply in the absence of a deed creating a power. (*u*)

So, if the first abstracted document contain recitals or other matter throwing a reasonable doubt upon the title as respects the contents or construction of the earlier documents, the purchaser may require the vendor, not only to produce, but also to abstract, so much of the prior title as may be sufficient to remove such doubt; but, in the absence of such reasonable doubt, the mere fact of earlier documents being recited would not entitle the purchaser to an abstract of them, although he may require their production if in the vendor's possession or power; (*v*) and it is sufficient to produce (without abstracting) an instru-

(*r*) *Clarkson v. Woodhouse*, 5 Durn. & E. 412; Burt. Comp. pl. 426.

(*s*) 1 Jarm. Conv. by S. 67.

(*t*) *Coussmaker v. Sewell*, Sug. 486.

(*u*) See *Nouaille v. Greenwood*, Turn. & R. 26.

(*v*) See *Prosser v. Watts*, 6 Madd. 59; 1 Jarm. Conv. by S. 63 and 64; 1 Hayes, Conv. 566.



ment which is required simply "to establish a fact or negative an inference."<sup>(w)</sup> Chap. VIII.

It is not *essential* that the origin of the title should be shown either by deed or will; in the absence of documents it may be sufficient to produce evidence of such

Need not in all cases commence with a document.

long uninterrupted possession, enjoyment, and dealing with the property, as to afford a reasonable presumption that there is an absolute title in fee simple.<sup>(x)</sup> But the proof of title by evidence of possession is not admissible in cases where documents forming part of the modern title are lost or destroyed; in such cases the vendor must prove their contents and execution.<sup>(y)</sup>

But evidence of possession is not sufficient, if modern deeds are lost or destroyed.

The title, wherever taken up, should be thence continued either in chronological or some other regular order: where separate parts of the estate are held under separate titles, such titles should, of course, be traced separately so long as they remain distinct: every subsequent document dealing \*with the legal estate, (except expired leases, and with the exceptions already referred to,)<sup>(z)</sup> should be abstracted; for instance, a mortgage and reconveyance are not to be suppressed under the notion that the title has been thereby brought back to its original state; such may, or may not, have been the case; and is a point to be determined by the advisers of the purchaser, not of the vendor: all documents forming part of the title should be abstracted in chief; the introduction of them merely as recitals in other abstracted instruments, (which is not uncommon, especially in the case of wills,) is, it is apprehended, clearly improper; were it not so, a copy of the conveyance to the vendor might, in many cases, take the place of an abstract; besides which, the omission to abstract a document in chief may proceed from a desire to avoid noticing matters of a suspicious character occurring in such document, but which are not noticed in the recital: it is convenient to introduce, in their proper places, direct statements of deaths, marriages, and other matters

Wherever commenced should thence be regularly continued—keeping separate titles separate.

[\*143]

All documents affecting legal estate to be abstracted.

Documents should be abstracted in chief.

Statements of matters of pedigree.

(w) Sug. 431.

(x) *Cottrell v. Watkins*, 1 Beav. 365.

(y) *Bryant v. Busk*, 4 Russ. 1; Sug. 460.

(z) *Supra*, p. 139.

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of pedigree ; and not, as is frequently done, to trust to the recitals in the abstracted documents ; and in cases of complicated descents, &c., a regular pedigree should accompany the abstract.

Suppression  
of instru-  
ments evi-  
dencing im-  
material or  
satisfied  
equities—  
How far  
justifiable.

Documents affecting merely equitable interests give rise to considerations of greater difficulty ; Sir *E. Sugden* states generally, that the solicitor "should abstract every document upon which the title depends, or upon which any difficulty has arisen : wherever he begins the root of the title, he ought to abstract every subsequent deed :"(a) this, however, it is conceived, must be understood to mean every document upon which the *purchaser's* title will necessarily depend ; if, for instance, the vendor be possessed of a document declaring that a prior owner who purchased, apparently on his own account, was in fact a trustee, or, that \*a mortgage-debt was trust-money, the title of the *vendor* who has notice of the trust may depend upon various instruments which would be altogether immaterial to a purchaser destitute of such notice ; and it would, it is conceived, be unusual and highly improper, for the solicitor to allow notice of such a trust to appear upon his abstract : this, however, it must be admitted, is, *pro tanto*, a departure from the general principle, that it is for the purchaser's solicitor, and not the vendor's, to judge of the materiality of the muniments of title : but it is sanctioned by convenience and universal practice. Other cases may perhaps occur in which a document may be, without material risk, suppressed ; as, for instance, where a good title is shown to the legal estate, and a charge, which clearly operated merely in equity, has been paid off and no trace of it appears upon the subsequent title ; the difference between the suppression of such an instrument and a legal mortgage is evident ; the equitable charge has no operation as against a subsequent purchaser for valuable consideration without notice, and his title, therefore, is not dependent on the sufficiency of the release ; nor does there seem to be any good reason for making a distinction between an equitable charge by deed, and a mere memoran-

[\*144]

(a) Sug. 432.

dum accompanying an old equitable mortgage by deposit, which, except upon special grounds, is never abstracted; but, in the case of a legal mortgage, the purchaser's title at law will depend (theoretically if not practically) upon the legal validity of the deed of reconveyance, whether its existence be known to him or not: still, even in the case of the equitable charge, it seems at least probable that a solicitor who suppresses it, under the idea that it is unimportant to the title, does so at his own risk; (b) and it is submitted, that such a course should rarely, or never, be taken, in respect of an instrument which is so framed that it could by possibility affect the legal estate; as, for instance, a mortgage of an equity of redemption, drawn as a conveyance with a proviso for redemption; and which, although merely a charge in equity if the first mortgage be valid in law, would yet pass the legal estate supposing it not to have been effectually transferred by the prior instrument.

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Deed which may operate on legal estate

[\*145]

should never be suppressed.

The loss of a deed of a date subsequent to the commencement of the abstract, is no objection to the title, if, under all the circumstances, the clear presumption be that the instrument, if produced, would not throw any difficulty about the title; (c) this doctrine, however, must be applied with the greatest hesitation to cases where modern deeds are lost, and no satisfactory evidence exists of their contents. (d)

As to loss of modern deeds.

The abstract should notice all judgments and other subsisting charges upon the property. (e)

Judgments, &amp;c., should be noticed.

The general rules for abstracting documents are ordinarily known, and may be found in full, in Sir. *E. Sugden's* treatise, and in the first volume of Mr. *Sweet's* valuable edition of Mr. *Jarman's* work on conveyancing.

Copies of wills abstracted, (if at all of an informal character,) and of private acts of Parliament upon which the title depends, should accompany the abstract.

Should be accompanied by copies of wills and private acts.

A statement of the evidence which the vendor is able to

And by statement of evidence.

(b) See Sug. 432.

(c) *Minchin v. Vance*, 2 S. Atk. Conv. 386, b.

(d) *Vide infra*.

(e) Sug. 445.

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produce in support of the title may conveniently accompany the abstract; this, however, is not often attended to.

As to consulting counsel thereon on behalf of vendor.

Cases not unfrequently occur of complicated titles, in which the solicitor who prepares the abstract will be justified in laying it before counsel on behalf of his own client; this remark applies particularly to heavy mortgage transactions, in which considerable expense to the mortgagor \*may frequently be saved by the delivery in the first instance of a perfect and well-verified abstract.

[\*146]

How to be copied.

An abstract may be written so illegibly, or upon paper of such an inconvenient size or substance, as to justify the purchaser's solicitor or counsel in declining to receive it. (f)

Effect of non-delivery of abstract, on purchaser's liability under the contract.

The non-delivery of a perfect (g) abstract on the day named, discharges the purchaser from any conditions binding him to make objections, &c., within a specified time after delivery; (h) and, at law, relieves him altogether from the contract: (i) in equity, however, the purchaser will be bound if either he neglect to apply for the abstract within a reasonable time before the day fixed for its delivery, (j) or if, upon its being subsequently tendered, he receive it without objection: (k) but the wilful neglect on the part of a vendor to prepare the abstract within the proper time, when pressed by the purchaser to do so, will, even in equity, entitle the purchaser to avoid the contract as soon as the time fixed for completion is elapsed: (l) where the purchaser's solicitor intends to rely upon the non-delivery of the abstract upon the day named, or (if no day have been named) within a reasonable time before the day fixed for completion, he should decline to receive it; or, if forwarded to him under circumstances which gave no opportunity for its rejection, he should at once return it, and without reading it. (m)

Non-delivery how to be taken advantage of.

Suggested course of

Where it is important to the purchaser to complete (if

(f) See Sug. 431.

(g) *Vide supra*, p. 131.

(h) *Southby v. Hutt*, 2 Myl. & C. 211.

(i) Sug. 289; *Berry v. Young*, 2 Esp. 640, n.

(j) *Guest v. Homfrey*, 5 Ves. 818, 823; *Jones v. Price*, 3 Amst. 924.

(k) Sug. 290; *Smith v. Burnam*, 2 Anst. 527.

(l) Sug. 290; *Seton v. Slade*, 7 Ves. 265.

(m) See 7 Ves. 278.

at all) at or about the time fixed for completion, and the abstract, having been called for, is delivered so late as to render it doubtful whether this can be accomplished, the most expedient course would appear to be, to return it unread, offering, however, to receive it again, without prejudice to the purchaser's right to annul the contract, if, on investigating the title, it should be found impossible to complete at (or within some short specified period after) the time originally fixed for completion.

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proceeding  
by pur-  
chaser.  
[\*147]

(5.) *As to the examination and perusal of the abstract.*

The purchaser's solicitor is entitled, if he please, to compare the abstract with the deeds before investigating the title, and the vendor (assuming that there is a binding contract) must pay the costs if the title prove bad ;(n) but unless the abstract be apparently defective, it is better to defer doing so until counsel's opinion (if taken) is obtained upon it.(o)[1]

Whether to  
be compared  
with deeds  
before inves-  
tigation of  
title.

(n) *Hodges v. Earl of Litchfield*, 1 Bing. N. C. 499.

(o) Sug. 437.

[1] The following are, in substance, the directions given by Sugden as to the examination and perusal of the abstract;—

In the first place, the perusal should, if the length of the abstract will permit of it, be finished at one sitting, although any difficult point of law, the whole bearing of which is ascertained, may properly be reserved for further and separate consideration.

It is not useful to make many notes, for they often distract the attention. Still a man should not encumber himself with unnecessary details. He may save himself much unnecessary labor, by a little method. He should have a book in which he should write his opinion, and there should be a margin. He should write his opinion as he proceeds, reserving, if necessary, any important point for subsequent consideration. If the title be complicated, he may leave a blank page in his book for references to the abstract, and queries to be considered. With some such exceptions, he will find it the best and surest method of arriving at a just conclusion, to trust to his view of the title on the face of the abstract itself, without encumbering himself with, or relying upon notes.

It may sometimes be useful to glance the eye over the abstract in the first place, in order to obtain a general view of the title, and experience will rapidly point out, when a subsequent part of the abstract may be looked into advantageously, before its proper turn; but speaking generally, an abstract should be perused but once, and that once, effectually. The party should never pass on, until he thoroughly comprehends what

A purchaser's solicitor, it is conceived, is *prima facie*: legally justified in incurring the expense of counsel's opin-

he has already read; the advancing in a difficult title, in order to comprehend what you have passed and do not understand, often leads to insurmountable difficulties.

It is the duty of counsel to see that the parcels are correct in the several instruments, and this particularly should be followed up step by step, when the descriptions can often be detected and reconciled; whilst upon a *general view* of them, it may be deemed impossible to connect them.

In perusing an abstract, it should not be taken for granted, that the dates are chronologically arranged, but the fact should be ascertained, although this will not, as to new titles, often be important, now that a will is allowed to operate on after-acquired property. And now, counsel should keep constantly in view, the recent statutes altering the law of dower, and curtesy, descent, wills, escheats, illusory appointments, executors, and the statute of limitations. In most cases, he will have to consider the early title with reference to the old law, and the recent title with reference to the new, and some caution will be necessary not to confound them, or the periods over which they operate; and the provision made by statute in favor of purchasers as regards voluntary settlements, and settlements with power of revocation, recoveries, unregistered deeds, bankruptcy, judgments, should also be kept in view.

Counsel, as he proceeds, in perusing the abstract, should call, in the margin, for evidence of facts which he supposes will readily be produced; for example, letters of administration, as evidence of intestacy; office extracts, from wills, to prove the appointment of executors and probate by them, as such inquiries in the margin, will enable him to confine his opinion to points of importance. So where the original documents cannot be obtained, he should, as he proceeds, require to be produced the probate, or an office copy of a will affecting a real estate, but not a resort to the original will, without some strong ground for suspicion. If it has not been proved, which a will of real estate need not be, of course the will itself should be produced. Where the estate is leasehold, or the title is to be shown to a term of years, carved out of the inheritance, which he must consider in point of title as a leasehold, the probate is the proper evidence, for the will itself is insufficient, or an office extract, if the probate cannot be obtained. He must also see that the probates or letters of administration, issued out of the proper court, and that the claim of representation is not broken; for an administration to an executor will not carry on the title any more than an executorship will to an administrator.

As counsel proceeds, he should, where the fact is not stated, inquire in the margin whether the deeds in a register country, have been registered, which will be proved by the certificate endorsed; whether instruments executed under powers, have been executed properly, and he should point out, in the inquiry, the proper mode of execution; for example "I presume this deed is attested by two witnesses, and that the attestation contains the words, signed and sealed." He should never rely upon the statement in an abstract, that the instrument was duly executed, but he should inquire into the requisite ceremonies, unless it is a common deed, in which

tion upon the abstract ; in London, perhaps, the majority of titles (except those of the simplest description) are submitted to counsel ; in the country, the practice inclines

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thereon on  
behalf of  
purchaser.

case, he may be content with the statements. He should also make inquiries in the margin, as he proceeds, for the purpose of obtaining an answer in the negative ; for example, a power to charge a sum of money, is stated in abstracting a settlement, but no trace of its having been executed appears in the abstract. The inquiry should be—Was this power executed ? The answer, as he may anticipate, will be, It was not. The object of the inquiry is to cast upon the seller and his solicitor the responsibility of stating, and therefore of ascertaining the fact, and for which statement, they would be responsible. Such an inquiry has often, moreover, led to the production of a deed, which it had been intended to suppress, and it leaves to the seller, or his solicitor, no excuse for his fraud, or negligence, if an appointment really was made, and created an incumbrance still in existence.

He should direct generally, the usual searches to be made ; but the extent of search must be very much guided by the station and character of the vendor. The purchaser should never rely solely upon having the deeds delivered up to him ; they would not protect him against judgments, or the like, and often not against mortgages, or against an annuitant who might not be postponed, simply on the ground of leaving the title deeds in the hands of the grantor ; for generally speaking, the title deeds are not delivered to an annuitant.

Where a particular piece of evidence is known to exist, of course, the seller is bound to produce it—for example, a certificate of a marriage—and the purchaser's solicitor is never directed to search for it ; but when it is not known whether there are not suppressed incumbrances, such searches are directed for the purchaser's own satisfaction, and he bears the expense of them, unless the contract goes off by the seller's default or want of title, and then he may recover the expense.

If a deed was executed by attorney, he should require the production of the power of attorney, and evidence that the principal was alive when the deed was executed by the attorney.

It is the duty of the conveyancer, in perusing an abstract, to consider the evidence necessary to support the title. In general, no difficulty arises. The sort of evidence required to support a title, is known to all, and consists mostly of office and attested copies or extracts, where the originals cannot be obtained ; and where it is necessary to prove the root of the title, or any intervening portion of it, without the common evidence of wills, leases, land tax assessments, and poor's rates are resorted to, in addition to affidavits of old inhabitants.

It would be useless to give any forms of abstracts, because every one having occasion to draw one, can obtain precedents, and common attention to the rules will readily enable the practitioner to correct the faults of the precedent before him. But he will best draw an abstract, and he best peruse it when done, who most understands the operation of the instruments themselves. See Sug. on Vend. vol. 2, chap. 9, sec. 2.

Chap. VIII. considerably the other way : it may be here remarked that the decisions of the various courts of law and equity have a retrospective effect upon titles ; so that, in estimating the value of a favorable opinion taken a few years previously, allowance must be made for the possibility of the title having been since rendered unmarketable, possibly unsafe, by some intermediate and unexpected exposition of the law. The abstract, when submitted to counsel, should, of course, be accompanied by a copy of the agreement and conditions of sale (if any.)

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As to perusing abstracts.

It is presumed that every person who habitually \*peruses abstracts keeps some memoranda of their contents ; an abstract book is desirable, not only as an assistance in the perusal, but also for the purposes of reference on future occasions.

Suggested mode of perusal.

Sir *E. Sugden* recommends that an abstract should be perused at a single sitting : (*p*) this, although desirable, is often impracticable : it is suggested, that the most convenient plan of perusal, (especially for those whose experience is limited) is as follows ; viz, immediately upon perusing, and thoroughly understanding, an abstracted document, to enter it, by its date and parties, in the abstract book, with as concise a statement as possible of its effect, and a memorandum of any peculiarity which may appear in its contents, or of any deficiency in the usual statements as to execution, registration, indorsement of receipts, &c. ; and then, in the margin of the abstract book, to make all those queries and requisitions which would properly be made if the instrument in question were the termination of the title, except such as the early date of the instrument, or other circumstances, may render evidently unnecessary : for instance, an estate tail has been created ;—the query will be, “how has this been barred ?” a man acquires within a recent period an estate in fee,—the query will be, “is any widow dowable ?” the estate is charged with an annuity,—the query will be, “is this a subsisting charge ?” a death or descent is stated,—the marginal note will be, “produce the usual evidence :” a deed is not re-



gistered,—the marginal note will be, “must be registered at the vendor’s expense:” in all probability, on advancing further in the abstract, most of the queries will be satisfactorily answered, and many of the requisitions will be found to be unnecessary; and, whenever this is the case, the pen may be passed lightly through the marginal \*note, not so as to render it illegible, but merely to show that it is unimportant, and the number of the subsequent page which supplies the information may be added by way of reference; by adopting this course, or some modification of it, an interruption in the perusal of the abstract is rendered comparatively unimportant; a very short reference to the abstract book is sufficient to show how matters stood at the time of the interruption; and when the perusal is finished, such of the marginal notes as have not been crossed out will furnish safe materials for the opinion.

The acceptance of a title, of course, is no waiver of objections which are not disclosed by the abstract; (q) nor, is a client bound by his counsel’s acceptance of a defective title, even although the defect appear upon the abstract: (r) [1] if, however, counsel waive a requisition, and the purchaser adopt his opinion and deal with the vendor on that view, he cannot afterwards repudiate it. (s)

If a solicitor be concerned for both parties, although of course bound to see that the purchaser does not buy with a defective title, or buy that which is in fact his own, he is not at liberty to disclose defects in the vendor’s title of

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Acceptance of title shown by—to what it extends.

Defects in client’s title must not be disclosed to client entitled to take advantage thereof.

(q) *Attorney General v. Silwell*, 1 Y. & C. 570; *Ward v. Trathen*, 14 Sim. 82; 8 Jur. 303.

(r) See *Deverell v. Lord Bolton*, 18 Ves. 505.

(s) *Alexander v. Crosby*, 1 Jo. & L. 666.

[1] Lord Eldon determined that where an abstract is laid before counsel who approves the title, his approbation is not to be taken as against the person consulting him, as a waiver of all reasonable objections; the court cannot compel a specific performance upon the ground of an opinion which it may think wrong. The purchaser may either take an opinion from some other counsel, or the one first consulted may correct his error in a further opinion. And although a purchaser’s solicitor state that all the objections to the title are removed, save one, and make such a statement in a case submitted to counsel, yet, if the seller file a bill, the purchaser will be entitled to a general reference as to title.

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which the purchaser might himself take advantage : and a solicitor acting in contravention of the rule has been held liable in an action for damages.(t)

(6.) *As to the verification of the abstract.*

Verification  
of abstract—  
what evi-  
dence may  
be required  
in proof of  
documents  
and facts.  
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Assuming that an apparently good title is deduced by the abstract, the next matter for consideration is, the evidence which a purchaser may require in support of it ; \*and this subject naturally divides itself into two heads, viz., first, what evidence may be required of the existence and genuineness of abstracted documents ; and, secondly, what evidence may be required of other matters of fact.

-As to proof  
of private  
acts.

A private act of parliament is sufficiently proved by the printed copy, if printed by the queen's printer ; and a recent statute renders it unnecessary to prove that the copy purporting to be, was in fact, so printed ;(u) nor was such proof previously necessary as respects private acts which contained the usual clause making printed copies evidence : in default of such evidence, an act should be proved by a copy examined with the original.(v)[1]

(t) *Taylor v. Blacklow*, 3 Bing. N. C. 235.

(u) 8 and 9 Vict. c. 113, s. 3.

(v) 1 Jarm. Conv. by S. 169 : as to proof of old private act, which has been omitted from the parliament roll, see *Doe v. Brydges*, 7 Sc. N. R. 338.

[1] It is a general rule that public acts of the legislature are to be taken notice of judicially by courts of law ; but private acts are not regarded by the judges unless formally shown, or unless the private act has been recognized by some public act. 1 Phil. Ev. 318.

In New York, the revised statutes may be read in evidence from the copies printed and published under the directions of the revisers, or any two of them, and certified by them to be true copies of the original acts, which certificate is required to be printed in each copy. (2 N. Y. R. S. 875, sec. 876.) And any person or persons residing in the state may print and publish the whole, or any part of the revised statutes ; but, to entitle any copy of a law so published to be read in evidence, there must be contained in the same book or pamphlet a printed certificate of the secretary of state, or of two of the revisers, that such copy is a correct transcript of the text of the revised statutes as published, except such typographical errors in the original, as may be corrected in such copy, and except such parts as shall have been altered by acts of the legislature ; and that, with respect to such parts, it conforms to the acts by which such alterations shall have been made. Ib. See *Waterman's Treatise*, pp. 147, 148.

An award under an Inclosure Act is proved by a copy, or extract, signed by the proper officer of the court, if the enrolment have been made in one of the courts at Westminster; or by the clerk of the peace for the county, or his deputy, if the enrolment have been made with the clerk of the peace. (w)

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Of awards  
under inclo-  
sure acts.

Copyhold assurances are proved by the copies of court roll signed by the steward; and it appears that, in strictness, evidence may be required of the steward's handwriting, except, perhaps, where he is dead, and the document is above thirty years old and comes from the proper custody: (x) such a requisition, however, when even modern copies come from the proper custody, is not usual in practice, unless there are special grounds for suspicion: copies authenticated by the steward are evidence, although they are not the copies originally delivered to the tenant: (y) and so also are mere examined copies: (z) the \*purchaser may, it is conceived, in the absence of special agreement, generally compel the vendor (at his own expense) to verify his abstract by the production of authenticated or examined copies, in cases where the originals are lost, even although the steward will allow the purchaser to inspect the court rolls: (a) probably, however, the rule might be different when, as may often happen, the vendor's solicitor, by being himself the steward, or otherwise, is enabled to produce the original rolls at the proper place for verification of the abstract, and can prove the loss or destruction of the original copies, so as to avoid any difficulty which may be raised by the doctrine of *Whitbread v. Jordan*. (b) If the vendor be thus obliged to procure fresh copies for the purpose of verification, they will (unless he retain, or sell to another person, an estate of greater value held under the same title) belong to the

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(w) See 41 Geo. III. c. 109, s. 35; 3 and 4 Will. IV. c. 87, s. 2.

(x) 1 Scriv. on Cop. 497; *Wynne v. Tyrokhitt*, 4 Barn. & Ald. 376.

(y) *Breeze v. Hawker*, 14 Sim. 350.

(z) See *Doe v. Freeman*, 12 Mee. & W. 844; and examined copies, not signed by the steward, do not require stamps: *S. C.*

(a) Scriv. 493.

(b) 1 Y. & C. Ex. 303.

Chap. VIII. purchaser.(c) If a surrender have been by attorney, the power of attorney must be produced, and evidence must be given of the principal having been alive at the time of its being acted on;(d) and, where the power was not given for valuable consideration, inquiry should be made whether it was revoked prior to its apparent exercise: the statement of a power of attorney on the court rolls is secondary evidence of the original, if the latter cannot be found.(e)

Of deeds.

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Deeds abstracted must be proved by the production of the originals, if not lost or destroyed;(f) the attesting witnesses (if alive,) may, perhaps, in strictness be required to prove the due execution,(g) unless the deed is thirty years old and comes from the proper custody;(h) but this, where a modern deed comes from such custody,(i) is never urged in practice except upon special ground:(j) when a deed has been executed by attorney, the same requisitions and inquiry should be made as in the case of a surrender by attorney:(k) where the loss or destruction of a deed can be proved,(l) secondary evidence may be given of its contents; but proof must also be given of its due execution and delivery;(m) an attested copy, however, taken and kept for 110 years in a public office, of a deed which could not be found, was admitted by Lord *Hard-*

(c) Scriv. 494; Sug. 476.

(d) Sug. 442.

(e) *Doe d. Counsell v. Caperton*, 9 Car. & P. 112.

(f) As to the mutilation of deeds, and defects in the stamps, etc., *vide infra*, p. 161.

(g) *Laythoarp v. Bryant*, 1 Bing. N. C. 421.

(h) 2 Phill. on Ev. 203; *Man v. Ricketts*, 7 Beav. 93.

(i) *I. e.*, a place where it may reasonably be expected to be found, although not the *most proper* place of custody; *Croughton v. Blake*, 12 Mee. & W. 205; *Doe v. Phillips*, 8 Q. B. 158.

(j) 1 Jarm. Conv. by S. 179. Sir E. Sugden seems to think that it is sufficient, in the absence of special circumstances, on the sale of freeholds, to prove the due execution of the conveyance of the fee to the vendor: V. and P. 463.

(k) *Supra*, 151.

(l) As to what evidence of loss is sufficient, see *Hart v. Hart*, 1 Ha. 1; *Green v. Bailey*, 15 Sim. 542.

(m) *Bryant v. Busk*, 4 Russ. 1; *Southby v. Hutt*, 2 Myl. & Cr. 207; and see *Doe v. Brydges*, 7 Sco. N. R. 339.

wicke as sufficient evidence of the original ; and he intimated that, under the special circumstances, a plain copy would have been admissible : (n) so, in a recent peerage case, the house of lords admitted as evidence an attested copy of a settlement dated in 1693, produced from the proper custody, and according to which possession of the estates had gone for many years. (o) Examined copies of deeds required by law to be enrolled, are, it appears, sufficient evidence of the originals ; but, where the enrolment is not compulsory, a copy is evidence only as against the parties on whose acknowledgment enrolment was made, and their representatives : (p) and the non-production of the original should be accounted for. (q) The recital of a deed is evidence of its existence as against all parties executing the deed containing the recital, and those claiming under them, but is no evidence of its contents or effect beyond what its name and nature necessarily imply, unless proof be given of its loss or destruction : (r) an examined copy of the memorial of a deed registered in a register county is secondary evidence of the deed as against the parties thereto, and all persons claiming under them, (s) but probably not as against strangers. (t) [1]

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Recitals of  
when evi-  
dence.

(n) *Harvey v. Philips*, 2 Atk. 541.

(o) *Fitzwater Peerage*, 10 Cl. & Fin. 952.

(p) 1 Jarm. Conv. by S. 170.

(q) But the enrolment, or an examined copy of the enrolment, of any deed executed under the provisions of the acts relating to the Duchy of Cornwall, is sufficient proof of the contents and due execution of the original, although its non-production be not accounted for ; see 7 and 8 Vict. c. 65, s. 34.

(r) Burt. Comp. 478, *et seq.*

(s) *Wollaston v. Hakewill*, 3 Man. & Gr. 297 ; *Doe v. Clifford*, 2 Car. & K. 448.

(t) *Doe v. Clifford*, *ubi supra* : but see *Collins v. Maule*, 8 Car. & P. 502.

[1] In New York, it is provided by statute that all conveyances, or writings concerning real estate, may be proved either by the originals themselves, acknowledged, or proved and certified in the manner prescribed by law ; or, where they have been executed, by the records thereof, or by certified transcripts from such records. 2 R. S. 759, 760.

Neither the certificate of the acknowledgment, or of the proof of any conveyance, nor the record, or the transcript of the record, of such conveyance, shall be conclusive, but may be rebutted, and the force and effect

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In a case in Ireland, by a settlement executed in 1745, estates were limited in strict settlement, with a power of revocation reserved to the settlor; this power was stated to have been exercised by a will dated in 1761, but of which neither the original nor any copy could be produced; the estates were re-settled in 1763 by a deed which recited the power of revocation and exercise of the power by the will, and possession had ever since gone under this deed: under these circumstances, *Sugden, C.*, held the recital to be sufficient evidence of the contents and execution of the will.<sup>(u)</sup>

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The same estates were limited in strict settlement in 1788; in February, 1814, the tenant for life and first tenant in tail entered into articles of agreement to bar the entail and re-settle the estates to certain specified uses, with a power of revocation; neither the original nor any copy of the articles could be produced, although search had been made for them; they were, however, recited in the deed making the tenant to the præcipe which was dated March 1814; in 1815, upon the marriage of the tenant in tail, the power of revocation was exercised, and the estates were re-settled, and had since been enjoyed accordingly: *Sugden, C.*, after remarking that the articles appeared to have been voluntary, and that the settlement was for consideration, held that, under the special circumstances of the case, the recital was sufficient evidence of the contents of the articles.<sup>(v)</sup>

Probably, in the above case the decision might have been different, if, instead of mere articles of agreement, the missing instrument had been one which affected the legal estate.

(u) *Alexander v. Crosby*, 1 J. & L. 666.

(v) *Alexander v. Crosby*, 1 J. & L. 666.

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thereof may be contested by any party affected thereby. If the party contesting the proof of a conveyance shall make it appear that such proof was taken upon the oath of an interested or incompetent witness, neither such conveyance, nor the record thereof, shall be received in evidence until established by other competent proof. 2 N. Y. R. S. 43, s. 20. See *Waterman's Treatise*, pp. 151, 152.

The recital or mention of a lease for a year in any conveyance executed before the 15th May, 1841, is sufficient evidence of the execution of such lease; without proof of its loss: (w) and in any renewed ecclesiastical lease granted since the 21st June, 1836, (unless in pursuance of a covenant or agreement entered into before the 1st of March, 1836,) the recital of the old lease, and of the deaths, &c., of the *cestuis que vie*, is conclusive evidence thereof. (x)

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Lease for a year proved by recital.

Renewed ecclesiastical lease.

A fine should be proved by the chirograph, or an exemplification under the seal (y) of the court, or a copy examined with the original roll and proved by the oath of the examiner: (z) mere office extracts, although often relied on, and generally received by conveyancers, are not evidence. (a)

Fines and recoveries.

A recovery is proved by an exemplification or an examined copy. (b) [1]

(w) 4 and 5 Vict. c. 21, s. 2.

(x) 6 Will. IV. c. 20, ss. 2, 9.

(y) The loss of the seal is immaterial, if the document comes from the proper custody; *Mayor of Beverley v. Craven*, 2 Moo. & R. 140.

(z) Burt. Comp. pl. 487; *Doe v. Ross*, 7 Mee. & W. 102.

(a) Buller's N. P. 227.

(b) Burt. Comp. pl. 490.

[1] "Alienation by matter of record," says Kent, "as by *fin*es and *common recoveries*, makes a distinguished figure in the English code of the common assurances of the kingdom. But they have not been in much use in any part of this country, and probably were never adopted, or known in practice, in most of the states. The conveyance by common recovery was in use in Pennsylvania, Delaware and Maryland, before the American revolution; but, it must have become obsolete with the disuse of estates tail. Fines have been occasionally levied in New York, for the sake of barring claims; but, by the New York Revised Statutes, vol. 2, p. 343, s. 24, fines and common recoveries are now abolished. They were abolished by statute in New Jersey, in 1799. They continued to be part of the law of Pennsylvania down to 1835. The entire disuse of common recoveries followed, of course, in this country, upon the abolition of estates tail; for, such a fictitious suit, considered as a conveyance of land in cases allowed by law, is most inconvenient and absurd. And since the acknowledged and long-settled competency of a tenant in tail to convey and bar the issue in tail, a more simple and easy mode of conveyance might well be contrived by the sages of the law in England. The conveyance by fine, as a matter of record, transacted in one of the highest

## Chap. VIII.

Proof of,  
under stat-  
utes.

\*Where an estate has been purchased and held for twenty years or upwards under a title which depends upon a recovery which has not been enrolled, the deed duly making the tenant to the præcipe, and leading the

courts of common law, has some great advantages, and merits a more serious consideration. Its force and effect are very great, and great solemnity is required in passing it because, said the statute of 18 Edw. 1, 'the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those who are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory and within the four seas, the day of the fine levied, unless they put in their claim within a year and a day.' This bar of non-claim was afterwards, by the statute of 4 Hen. VII., extended to five years. These statutes, and this bar of non-claim after five years, were re-enacted in New York, and continued in force until January, 1830; and common recoveries were equally recognized by statute, as a valid mode of conveyance, down to this last-mentioned period. Such a formal, solemn, and public mode of conveyance, with such a short bar by non-claim, was resorted to in special cases, where title had become complex, and the property was of great value, and costly improvements were in immediate contemplation. Doctor Tucker recommended a resort to it, in Virginia, on this very account. In our large cities, where land is exceeding valuable, and very expensive erections are constantly making, it may be desirable that the certainty of the title should be established within a shorter period than twenty years. This is the only objection that could possibly be made to the abolition of the conveyance by fine; for, as to the notoriety of the transfer, it is by no means equal to the record of a deed in the county where the lands are situated, and where all persons are accustomed to resort, as being the only place for information. In point of fact, the levying a fine, with us, may be considered to partake of secrecy, for it never attracts public observation. But when we come to consider the state and condition of real property in England, where conveyances are not, in general, required to be recorded, a formal proposition to abolish fines was not to have been anticipated. The circumstances of the two countries are totally different. I should suppose that there must be great veneration justly due to a system of transfer by record which has exhausted so much cultivation, which has been transmitted down, in constant activity, from distant ages, and on whose foundations the best part of English real property reposes. Such a great innovation may have an unpropitious influence upon the character, policy, and stability of the English jurisprudence. It will, however, favorably abridge the labors of students, and make great havoc in an English law library. Volume after volume, filled with essays and adjudications upon fines and recoveries, will be consigned to oblivion. Besides the extended view of the law of fines and recoveries, in all the abridgments of the law and Sheppard's Touchstone, there are the treatises of Pigott, Wilson, Cruise, Preston, Bayley and Hands, on the same subject." 4 Kent Com. 497, 498, 499.



uses of the recovery, is sufficient evidence thereof, as in favor of the purchaser and all parties claiming under him.<sup>(c)</sup> Chap. VIII.

The 3 and 4 Will. IV. c. 74, s. 13, provides for the change of custody of the records of fines and recoveries levied and suffered at Westminster, Lancaster and Durham; and makes extracts and copies, supplied after such change of custody, as available in evidence as they would have been if supplied in the usual way before the passing of the act; and, by the 5 Vict. c. 32, provision is made for the enrolment, in the office of the Registrar of the Court of Common Pleas at Westminster, of the proceedings in fines and recoveries levied and suffered in the Courts of Great Session in Wales, and the Court of Great Session in Cheshire, and for remedying in certain cases defects in the original records;<sup>(d)</sup> and by the 11 and 12 Vict. c. 70, evidence of fines at Westminster having been levied with proclamations is rendered unnecessary.

A grant from the crown is regularly proved by an exemplification, or certified copy; but if the original be lost, and the vendor's solicitor ascertain and inform the purchaser where the grant is enrolled, the latter cannot, it appears, require a copy, but must examine the enrolment at his own expense.<sup>(e)</sup> Proof of grant from crown.

Proceedings in the courts of law and equity are regularly proved by exemplifications under the seals of the courts, or authenticated by the signature of the judge, (in cases where the court has no seal;)<sup>(f)</sup> and proof of the seal or signature is rendered unnecessary by the 8 and 9 Vict. c. 113.<sup>[1]</sup> Of proceedings at law and in equity. [\*156]

(c) 14 Geo. II. c. 20, s. 4.

(d) See *Doe v. Price*, 16 Mee. & W. 603.

(e) Sug. 450.

(f) *Alves v. Bunbury*, 4 Camp. 28.

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[1] A judge's order may be proved by the production of the order itself (4 Campb. 17.) Affidavits made in other states, must be authenticated as follows; 1. They must be certified by some judge of a court having a seal, to have been subscribed and taken before him, specifying the time and place, when and where taken. 2. The genuineness of the signature of such judge, the existence of the court, and the fact that such judge is a

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And in bankruptcy and insolvency.

Proceedings in bankruptcy and insolvency are proved by copies certified in manner directed by the several acts; see as to insolvency, 53 Geo. III. c. 102, s. 24; 7 Geo. IV. c. 57, s. 76; 1 and 2 Vict. c. 110, s. 105; 5 and 6 Vict. c. 116, s. 11; 7 and 8 Vict. c. 96, s. 37: and as to bankruptcy, 6 Geo. IV. c. 16, s. 97; 1 and 2 Will. IV. c. 56, s. 29, and 12 and 13 Vict. c. 106, ss. 232 *et seq.*; proof of the seals and signatures is rendered unnecessary by the 8 and 9 Vict. c. 113.[2]

As to the enrolment of proceedings in bankruptcy.

The fiat, (or, if the case be under the recent act,<sup>(g)</sup> the petition,) adjudication and certificate of appointment of assignees, if not enrolled, ought to be entered on record by the vendor, and at his expense; Mr. Jarman considers that this is necessary although the bankrupt will join in the conveyance:<sup>(h)</sup> Sir E. Sugden's opinion is the other way; and also, that such a requisition cannot be insisted on if it be too late to upset the fiat.<sup>(i)</sup>

Proof of by office copies.

Office copies, (*i. e.* copies made by an officer of a court under its authority,) although not strictly evidence, except in the causes or matters to which they belong, are received as evidence by conveyancers.

As to certified copies of records under 1 and 2 Vict. c. 94.

And we may here remark, that by the 1 and 2 Vict. c. 94, the records of the Courts of Chancery, Exchequer, Queen's Bench, and Common Pleas, and of the abolished courts of Wales, Chester, Durham, and Isle of Ely, are committed to the custody of the master of the rolls; and, by sections 12 and 13, certified copies of such records under the seal of the record office, are made evidence equally with the originals.

Proof of will.

[\*157]

The probate, or (if that be lost) an official copy, is \*usually received by conveyancers as sufficient evidence

(g) 12 and 13 Vict. c. 106.

(h) 1 Jarm. Conv. by S. 97.

(i) Sug. 672.

member thereof, must be certified by the clerk of the court under the seal thereof. 2 N. Y. R. S. 492, sec. 26.

[2] Proceedings under the insolvent laws may be proved, either by the original documents or the records thereof, or transcripts of such records, duly authenticated. 2 N. Y. R. S. 94, secs. 19, 20.

of a will, whether relating to real or personal estate; (*j*) although the probate has been held to be in strictness inadmissible, even as secondary evidence, in a question of title to freehold (*j*) or copyhold (*k*) property: however, in recent peerage cases, the copy of a will produced from the prerogative office has been received in evidence, upon the absence of the original from the office being accounted for; (*l*) the Probate Act Book of the Ecclesiastical Court is evidence of the appointment of executors; (*m*) and an official extract from such book is often received in practice, where (as in the case of tracing the title to a chattel real held in trust) there is little chance of the will containing a specific bequest of the term which may have been assented to by the executor: (*n*) where, however, a title has to be shown to a beneficial chattel interest, the risk of there having been such a bequest and consent renders it necessary to examine the entire will; and it is conceived that the purchaser may, in either case, require production of the probate or an office copy. A will thirty years old, produced from the proper custody, proves itself; and the thirty years are to be computed from the date of the will and not of the death. (*o*) [1]

(*j*) 4 Jarm. Conv. by S. 178.

(*k*) Scriv. on Copyhold, 499; *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 570: but see *Archer v. Slater*, 10 Sim. 624; 11 Sim. 507. And see, as to the proof of a will, the original of which is abroad or has been lost, *Pullan v. Rawlins*, 4 Beav. 142, and notes of cases subjoined; and *Rand v. Macmahon*, 12 Sim. 553.

(*l*) *Fitzwater Peerage*, 10 Cl. & Fin. 952; *Braye Peerage*, 6 Cl. & Fin. 767; see, however, the *Natterville Peerage*, 2 Dow. & Cl. 342, where Lord Eldon held, that proof must be given of the actual loss or destruction of the original.

(*m*) *Cox v. Allingham*, Jac. 514.

(*n*) The clause disposing of trust estates is generally so worded as to exclude chattels real—besides which the devisees in trust are usually the executors.

(*o*) *Man v. Ricketts*, 7 Beav. 93.

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[1] Wills which have been recorded may be proved, either by the originals properly certified by the surrogate or by exemplified transcripts from the records. (2 N. Y. R. S. 120, sec. 11; *Ib.* 121, sec. 21.) In other cases they must be proved like other sealed instruments.

In New-York, the will, the proofs and examinations taken by the sur-

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In deducing title to chattel interests probate must be seen to have been granted by proper court.

Will need not be proved in equity.

Documents not part of the title must sometimes be produced as negative evidence.

\*In examining the title to a chattel interest, care should be taken to see that probate has been granted by a court having jurisdiction: it appears, that where an executor takes out prerogative probate, and dies leaving an executor who proves in a Diocesan Court, the title of the second executor, as a representative of the original testator, is too doubtful to be forced upon a purchaser.(p)

Upon a sale by a devisee of a freehold estate, the purchaser cannot,(q) except under special circumstances,(r) require the will to be proved in equity against the heir-at-law.

It may sometimes happen that a purchaser can require the production of an instrument although it forms no part of the title, and although he cannot claim an attested copy on completion: *e. g.*, where property is vested in trustees, in trust to sell, with power to give receipts, and the trusts of the purchase-money are declared by a settlement referred to in the conveyance, it is generally considered that a purchaser can require the production of the settlement for the purpose of seeing that it contains nothing inconsistent with the power to give receipts, nor any other matter affecting the title, but that he is not entitled to any attested copy or covenant for production; and the fact of his not being entitled to such covenant or copy, negatives, it is conceived, the right of any subsequent purchaser to require the production of the settlement:(s) it must, however, be noticed, that in a case of *Cooper v. Emery*,(t) upon a sale by a party claiming

(p) *Williams v. Bland*, 2 Coll. 575.

(q) Sug. 464.

(r) *Grove v. Bastard*, 2 Ph. 619.

(s) 2 Ha. 260.

(t) Cited, 1 Hayes, Conv. 573.

rogate, are to be recorded in a book, and the record signed and certified by him. The will so proved is to have a certificate of such proof endorsed thereon, signed by the surrogate and attested by his seal of office, and may be read in evidence without further proof thereof. And the record of the will, and the exemplification thereof, by the surrogate having the legal custody, is to be received in evidence, and to be as effectual in all cases as the original will would be, if produced and proved, and may, in like manner, be repelled by contrary proof. 2 R. S. 57, secs. 7, *et seq.*; Ib. 58, sec. 15.

under the heir-at-law of a deceased owner who left a will, Chap. VIII.  
 Sir L. Shadwell, V. C., is reported to have held that the  
 purchaser was entitled to inspect the will, but could not  
 insist upon a covenant for its production; thus, appa- [\*159]  
 rently, deciding, that he was bound to accept a title with-  
 out the ordinary means of proving its validity on a resale.

In many cases, however, where the possession has been  
 consistent with the *prima facie* title, presumption may  
 supply deficiencies in proof of the existence, or due Deficiencies  
in proof of  
documents,  
how far  
supplied by  
presump-  
tion.  
 execution, of material instruments; (u) the principle in the  
 case of deeds, (and which, in general, seems equally  
 applicable to other instruments operating *inter vivos*),  
 being this, viz., that where there has been long enjoyment  
 of any right which could have had no lawful origin  
 except by deed, there, in favour of such enjoyment, all  
 necessary deeds may be presumed, if there be nothing to  
 negative such presumption: (v) for instance, a grant from General  
rule.  
 the crown of an advowson (excepted in a former grant  
 under general words) has been presumed as against a  
 purchaser, after an uninterrupted possession evidenced by  
 title deeds for 133 years and three presentations; (w) so, a  
 reconveyance of the legal estate from trustees has been  
 presumed, the property having for 110 years been dealt Presump-  
tion of  
grant from  
Crown.  
 with without reference to its remaining outstanding, al-  
 though the enjoyment was consistent with the supposition  
 of such being the case; (x) so, where copyholds were Of recon-  
veyance of  
legal estate.  
 devised to trustees, upon trust to pay testator's debts,  
 funeral expenses, two annuities, and a legacy; and then  
 to convey the premises to T. W.; and T. W. was admit- Of copyhold  
surrender.  
 ted in 1771, and a party claiming under him accepted an  
 enfranchisement in 1791, the validity of which was con-  
 sidered to depend upon the regularity of T. W.'s admit- [\*160]  
 tance, a prior surrender by the trustees to the use of T. W.

(u) See *Chalmer v. Bradley*, 1 Jac. & W. 63.

(v) *Lyon v. Reed*, 13 Mee. & W. 285, 303; approved in *Creagh v. Blood*, 3 J. & L. 133: and see *Monk v. Huskisson*, 1 Sim. 285; *Alt.-Gen. v. Fishmongers' Company*, 5 Myl. & Cr. see p. 25; and see early cases collected in *Read v. Brookman*, 3 Durn. & E. 151.

(w) *Gibson v. Clarke*, 1 Jac. & W. 159.

(x) *Hillary v. Waller*, 12 Ves. 239; and see *Emery v. Grocock*, 6 Madd. 54; and *Noel v. Bewley*, 3 Sim. 103.

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Of payment of mortgage, and of reconveyance.	payment of a mortgage debt, and a reconveyance of the legal estate, have been presumed after an interval of eighty years, the mortgage not being subsequently mentioned in the title deeds, and the mortgage deeds having for twenty-five years been in the possession of the vendor and his ancestors, during which period no claim, it was alleged, had been made for principal or interest : (z) so, after forty years' possession of copyholds under a will, a surrender to the use of the will was presumed in an early case ; (a) so, the enfranchisement of a copyhold has, after an enjoyment of 160 years, been presumed even against the crown : (b) so, in the general, it will be presumed that mesne assignments of attendant terms have been regularly made. (c) [1]
Of surrender to use of will.	
Of enfranchisement.	
Of mesne assignments of Terms.	

(y) *Wilson v. Allen*, 1 Jac. & W. 614.

(z) *Cooke v. Soltau*, 2 Sim. & St. 154 ; but the lapse of 46 years from the death of a Testator, and of 39 years from the last notice of legacies charged by his Will, has been held insufficient to warrant a presumption of their payment : see *Shields v. Rice*, 3 Jur. 950.

(a) *Luford v. Coward*, 1 Vern. 195.

(b) *Roe v. Ireland*, 11 East, 280.

(c) *Earl v. Baxter*, 2 W. Bla. 1228. As to presuming the surrender of satisfied terms for years, see Sug. Appendix, 26 ; and *Garrard v. Tuck*, 13 Jur. 871, C. P. The late Act of 8 & 9 Vict. c. 112, has deprived the doctrine of much of its practical importance : it must, however, be remembered that the Act is not of universal application, *supra*, p. 137 ; and that where it applies, a vendor must still show in whom old terms, supposed to have been destroyed by the Act, were vested on the day when it came into operation, and that they were then attendant on the inheritance ; so that the doctrine above referred to, of presuming the existence of mesne assignments, is still of practical moment.

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[1] A presumption is an inference as to the existence of a fact, not actually known, arising from its necessary or usual connection, with others, which are known. It is upon this principle that all our knowledge of those relations and existences, which are not perceptible to the human senses, must depend.

Sixty-one years adverse possession was held conclusive against the lord proprietor of the northern neck in Virginia, under a patent which omitted words of inheritance. But it was denied that the maxim, *nullum tempus occurrit regi*, applied to a question between the lord and an adverse possessor ; nor does the presumption of a grant seem to have been resorted to—*Birch v. Alexander*, 1 Wash. Rep. 34. On a proceeding by caveat, after quiet possession of sixty years, a grant of land from the crown was pre-

So, the grant of an easement will be presumed after twenty years' enjoyment(d); but to raise such presump-

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Of grant of easement.

(d) See *Darwin v. Upton*, cited 3 Durn. & E. 159; and later cases cited in 4 Jarm. Conv. 151.

sumed. *Archer v. Sadler*, 2 Hen. & Munf. 370—376. This was accompanied with a payment of quit rents, and the fact that the records of the court where the patent should have been registered, were destroyed. *Id.* 377-8. Forty years' adverse possession, with some very slight additional circumstances, were put to the jury in North Carolina, in 1801, as the basis on which they might presume a grant from the Crown; and they found one, *Den ex Dem. Hanks v. Tucker*, Tayl. 157; and a similar possession of forty-seven years, connected with other circumstances, was held, in South Carolina, admissible to the jury as the ground on which they might presume a similar grant, *Alliston's lessee v. Saunders*, 1 Bay, 26; and so said in *Clure v. Hill*, 2 Rep. Const. Court, 420, 424, and that, now, twenty years are enough.

After the presumption of land for ninety years, in the midst of a thickly settled country, building a church on part of the land, and using it for public worship, and occupying a part as a burial ground, a grant from the commonwealth of the land, or, at least, the pre-emptive right may be presumed. *Malher v. Trinity Church*, 3 Serg. & Rawle, 509. So, *Vermont v. Reynolds' executors*, 3 Vermont Rep. 542. Where, from the character and situation of the property, and the want of deeds, neither an actual nor constructive adverse possession could be made out, so as to let in the statute, circumstances considered equivalent, have been received as the ground for presuming a grant. *Jackson ex dem. Livingstone v. Schutt*, (cited and stated per Kent, J., 3 John. Cas. 113.)

Where a change in the ownership of an estate, as evinced by possession and enjoyment, has taken place at a remote period, and the title deeds, both previous and subsequent, are mostly forthcoming, a chasm which occurs in the documental evidence is sometimes filled up by presumption. In such a case, strong acts of acquiescence, abandonment, or submission, have often been made the foundation of presuming even records as well as acts, *in pais*, in finishing out the title, whether of corporeal or incorporeal property. On this ground, the chancery enrolment of a decree for titles, was presumed in favor of the clergy against the inhabitants of London. 2 Dow. & Clarke, 135. On due proof of a will, the acting as executrix and sales as such, with the destruction of the probate records by fire, was allowed as the ground for presuming a regular probate. On a partition made by commissioners, under the statute of 1762, a balloting-book was necessary to be filed and kept of record; but, in one case, could not be found in the proper office. After long possession in severalty, other things appearing to be regular, a ballot-book was presumed, according to the possession, and the requisite map and field book, which map and book were produced from the proper files: 13 John. Rep. 367. So of a deed from the commissioners. 11 John. Rep. 446—456.

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tion, it is necessary to show, not only enjoyment, but that the party to whom the grant is attributed had power to make it.(e)

(e) *Barker v. Richardson*, 4 B. & Ald. 579: as to the statutory title which may be acquired under the recent Acts, and which is independent of the title which may be acquired under the ordinary title of presumption (*Welcome v. Upton*, 5 Mee. & W. 398; *Dewkirst v. Wrigley*, 1 C. P. Cooper, 329,) *vide infra*.

Where an administrator conveyed a farm subject to the widow's dower, and possession of the two-thirds, under the deed, was held over thirty years, the presumption of regularity in the administrator's proceedings, prior to his deed, was held to arise in favor of the reversion of that part which was holden by the tenant in dower. In this case, most of the probate proceedings preliminary to a sale, viz., the declaration that the estate was insolvent, the inventory and appraisal, account of the administrator on the sale, and order of the administrator to pay 19s. 1d. on the pound, were proved; also, the clerk's minute of an order of sale; but no record could be found directing the sale, or the manner of the sale, and that was presumed. *Hazard v. Martin*, 2 Term Rep. 77, 85. A deed from executors being proved, the court will presume the sale to have been public: that being their duty. *Turnspeed v. Hawkins*, 1 McCord Rep. 272. But a decree and subsequent proceedings on sale of land, furnish no evidence that an inventory was filed. *Goodwin v. Sheldon*, 1 Day, 312. Yet, after twenty years' possession, under an administrator's sale, other things being proved to have been regular, the presumption will be that he took the oath and advertised the sale; and this even against the heir. *Gray v. Gardner*, 3 Mass. Rep. 399; *Knox v. Jenks*, 7 Mass. Rep. 488. After twenty years' possession of most of the land in severalty, according to a partition duly proved among the proprietors, the posting of advertisements, which were necessary to the regularity of the proprietary meeting, may be presumed. 2 N. H. Rep. 310, 313. So, after great lapse of time as thirty years, after a collector's sale of land for taxes, the regularity of tax bills, valuations, warrants, &c., may be presumed from circumstances. *Colman v. Anderson*, 10 Mass. Rep. 105. So, after sixteen years from a sale under power, in a mortgage, the presumption may be made that the notices of sale were regularly posted and published. *Bergen v. Bennett*, 1 Caines' Cases in Error, 1—18.

In the case of *Beall's lessee v. Lynn*, 6 Harr. & John. Rep. 361, the court remarked: "Presumption is often resorted to for the purpose of supplying defective evidence; and in this country it is not oftener applied to any subject than to supply defective title to lands. It would be difficult to make out the titles to many of the elder tracts of land in this State by a regular deduction of title deeds, from the patentees down to the present proprietors, without resorting, in some stage of them, to presumption. Records may sometimes be lost or destroyed, ancient title papers may be defectively executed, or the proof of them, from lapse of time may be impossible. Yet, in all these cases, the possession may have been invariably



\*So, the formalities of a deed are readily presumed; for instance, sealing and delivery will be presumed from proof of signing, and the whole will (if the deed comes from proper custody) be presumed after 30 years without any proof at all(f)[1] or within that time from proof of

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Of the formalities of deeds.

(f) As to loss of a seal, *vide supra*, p. 154.

in the person claiming the land, and in those from whom he derives his title. In such cases, possession which has been long undisturbed, and which is, in general, the concomitant of title, induces a belief in the mind of title, little short of that which would be produced by the adduction of the most undeniable and best authenticated evidences of right. Proprietary grants, under certain circumstances, are presumed. In general, these presumptions are bottomed upon the existence of certain facts, which can leave but little doubt upon the mind of the truth of the fact which we are called upon to presume. They frequently, too, derive their force and efficacy from that vigilance with which the law guards ancient possessions; which, sooner than they should be disturbed, presumes that they had, in contract, a rightful commencement."

It may be presumed, on long possession, that an attorney had not exceeded his authority to convey, *i. e.*, that the condition precedent on which he was to convey, had been fulfilled. 4 Monroe Rep. 395. And after twenty-three years' possession under a deed, purporting to have been made by an attorney, the power itself may be presumed. 6 Mart. Lou. N. S. 153. So the power of trustees, on a long possession under their deed. *Fitzhugh v. Crogan*, 2 J. J. Marsh. Rep. 429, 437.

In all these cases, in order to found a presumption, there must not only be a possession, or what is equivalent, of the person in whose favor the inference is sought to be shown, but it must be exclusive and adverse in its character, though it need not, in all cases, be by actual enclosure. 6 Har. & John. 361.

[1] Some presumptions are founded on the dictates of prudence and discretion; as that regular and ordinary means are adopted for a given end. Hence, where the means calculated to attain a certain end, appear to have been adopted, or the end itself appears to have been attained, a technical and particular completion in the one case, or all the ordinary previous steps in the other, need not be proved, but will be presumed; especially if the absence of particular proof be accounted for. Thus, proof of sealing and delivery, without the signing of a deed, the usual place on the deed, for this being mutilated, would doubtless warrant the presumption, that the deed was signed. So, if the deed be lost. So where the attestation says only "sealed and delivered," in a case where you are put to proof of the subscribing witness' hand-writing; or where there is no attesting witness; but you prove the parties hand to a paper sealed, with the usual attestation "sealed and delivered," the paper being in your hands and for your benefit; or in the ordinary case of establishing a con-

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Notwith-  
standing  
mutilation.

Of livery of  
seisin.

Of appoint-  
ment of In-  
closure  
commis-  
sioners.

Of deeds  
having  
been duly  
stamped.

[\*162]

But not of  
forms re-  
quired by  
law on  
grounds of  
general po-  
licy.

a deceased subscribing witness's handwriting ;(*g*) so, in a modern case, the House of Lords held that a parchment writing, purporting to be the first skin of an Indenture consisting originally of two or more skins, and severed by a sharp instrument, but which came from the proper custody, was properly received in evidence in ejectment ; and that the mutilation of a deed forms an objection rather to the value than to the admissibility of the evidence ;(*h*) so, livery of seisin will be presumed after twenty years' consistent possession ;(*i*) so it will be presumed that persons who have executed an award under the general Inclosure Act were regularly appointed and took the necessary oaths ;(*j*) so, it will be presumed that an instrument, duly executed and which is lost, was also duly stamped, (*k*) unless the particular circumstances of the case forbid such a conclusion ; as where the instrument has been fraudulently destroyed by the party chargeable thereon, and it can be shown to have been unstamped when it came into his possession ;(*l*) so also that stamps, the amount of which is obliterated, were of the right amount ;(*m*) but the courts will not presume that forms have been \*complied with, which the legislature, upon grounds of general policy, has made essential to the validity of an instrument ;[1] as, for instance, the enrolment

(*g*) *Gresley on Ev.* 492.

(*h*) *Lord Trimlestown v. Kemmis*, 9 Cl. & Fin. 773, 775.

(*i*) *Rees v. Lloyd*, Wight. 123.

(*j*) *Casamajor v. Strobe*, 5 Sim. 87, 98 ; 2 Myl. & K. 708.

(*k*) *Hart v. Hart*, 1 Ha. 1.

(*l*) *Smith v. Henley*, 1 Ph. 391 ; and see *Blair v. Ormond*, 1 De G. & S. 428.

(*m*) *Doe v. Coombs*, 6 Jur. 930, Q. B.

tract, by simply proving the signature to be in the hand-writing of the party to be charged. In all these cases, something is wanting in the direct proof ; the hand-writing in one case, the sealing in another, the delivery in another, yet the facts which are proved lead irresistibly to the presumption, that the other acts requisite to give validity to the instrument, were, in truth, done ; and the law applies the maxim, *omnia presumuntur recte solemniter esse acta donec probetur in contrarium*. See 12 Wheat. 70.

[1] In *Doc dem. Beanland v. Hurst*, 11 Price, 475, 489, to 492, the ques-

under the Statute of Charitable Uses of the conveyance of an estate to trustees for a charity.<sup>(n)</sup> Chap. VIII.

And it seems that, as a general rule between vendor and purchaser, the latter must admit, as presumptions, all matters which, in a court of law, the judge would clearly direct the jury to presume; but not matters as to which the Judge would leave it to the jury to pronounce upon the effect of the evidence.<sup>(o)</sup>

General rule of presumption between vendor and purchaser.

As respects evidence upon matters of fact, (other than documentary facts,) it may, it is conceived, be laid down as a general rule, that a purchaser can, in strictness, require evidence of all facts material to the title from the date at which its regular deduction commences, whether such facts are to be used as positive or negative proofs; that is, of all facts whose existence must be either proved or assumed in order to establish affirmatively the vendor's title, *e. g.*, the heirship of a vendor who claims by descent; and of all facts whose existence must be either

Evidence of matters of fact.

As to what facts the purchaser can require to be proved.

<sup>(n)</sup> *Doe v. Waterton*, 3 Barn. & Ald. 149; *Wright v. Smythies*, 10 East, 409.

<sup>(o)</sup> *Emery v. Grocock*, 6 Madd. 54; *Hillary v. Waller*, 12 Ves. see p. 270; see *Baldwin v. Peach*, 1 Y. & C., Ex. 453, which however was not a case between vendor and purchaser.

tion arose whether a deed respecting lands can be presumed in a registering county. The English act for registering deeds and conveyances in the west riding of Yorkshire, on which act, the question arose, is nearly the same as our general registry acts in the United States. In this case, a grant of coal in the west riding of Yorkshire, was sought to be presumed, from circumstances. This was resisted, on the ground that the registry alone was evidence; and it was not registered. It was contended that the omission effectually repelled all presumption in the case. The point does not appear to have been decided. But on the argument at bar, *Re v. Long Buckby*, 7 East, 45, was cited and would seem to be conclusive that such a case presents as fair a subject of presumption, as any other. In the latter case an indenture of apprenticeship had been lost, and was to be proved by parol; but there was no evidence that it had ever been stamped; and no registry of that fact at the stamp office, where it must have appeared, if there had been no irregularity. But after nearly twenty years, during which the indentures had been acted upon as valid, the court held that the evidence of non registry, was not sufficient, *per se*, to repel the presumption, but they would rather suppose that the paper had been stamped, and that the proper office had omitted the registry by mistake.

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proved or assumed in order to establish such title merely by displacing the known or presumptive title of others; *e. g.*, the failure, determination, or release, of some prior estate or incumbrance whose existence is either known or may be presumed as between vendor and purchaser: so, also, he may require a satisfactory explanation of matters which tend to impeach the validity of the abstracted instruments. (*p*)

[\*163]

Negative evidence cannot be required if not in vendor's possession or power, but vendor must, if he can, answer all relevant questions.

\*But, as a general rule, a purchaser cannot compel the vendor to procure evidence for the purpose of negating mere possibilities, although he may require him to answer, to the best of his knowledge, any relevant question on the subject, and to furnish all evidence in his possession or power; *e. g.*, where a power has been created, and there is no trace of its subsequent execution, the purchaser, although he can require the vendor and his solicitors to state whether to their knowledge or belief the power was ever exercised, and may, perhaps, compel the vendor to make a statutory declaration upon the point, cannot, it is conceived, call for such a declaration by any other person; neither can he require the vendor to search for judgments or other incumbrances; so, neither, where the title commences with a conveyance by a person who conveys as heir at law, can the purchaser require any other evidence of the ancestor's intestacy than such (if any) as is in the vendor's possession; (*q*) so, where a vendor is or has been married, the purchaser should inquire whether any settlement was executed on his marriage, and, if this were the case, may require to see the settlement if in the vendor's possession or power; but if the vendor cannot produce it or a copy, the purchaser, it is conceived, must rest content with his assurance or statutory declaration that it did not affect the property in question, although, as a matter of prudence, he should, of course, make inquiries of the wife's family on the subject: in fact, the general rule would seem to be, that, where a *prima facie* title is shown, the purchaser can require no evidence, not in the vendor's

(*p*) See *Hobson v. Bell*, 3 Jur. 190: a case of erasure.

(*q*) Sug. 486.

possession or power, tending to negative any matter the existence of which may not be presumed either from the contents or nature of the abstracted documents or by the ordinary rules of law or equity.

\*And it seems that, where a *prima facie* title is shown, the purchaser cannot require from the vendor a general explanation of circumstances which the purchaser may consider to be of a doubtful character, but must confine himself to questions directed to the particular defect which he apprehends; where, for instance, a tenant for life with power of appointment exercised such power in favor of his eldest child, and the father and child then concurred in mortgaging the property, (a transaction which is *prima facie* valid under the authority of *M'Queen v. Farquhar*,<sup>(r)</sup> upon a suit for specific performance, and an examination of the vendor upon interrogatories, an interrogatory as to the existence of an underhand agreement that the child should join in the mortgage was not excepted to by his counsel, and appears to have been considered unobjectionable by the court; but a general interrogatory as to "what was his motive or object in making the appointment" was held to be inadmissible.<sup>(s)</sup>

And where an appointment had been made under similar circumstances in favor of an eldest child who joined with the parents in mortgaging the estate, and upon the mortgagee attempting a sale one of the younger children gave notice to the purchaser not to complete, stating that the appointment was a fraud upon the power, but not alleging any fact in support of this assertion, and did not follow up the notice by any proceeding, it was held, that a good title was shown, and that the notice did not oblige the vendor to render any further explanations.<sup>(t)</sup>

Where, however, a will had been executed in favor of (*inter alios*) the medical man and solicitor of the testator, and the heir at law disputed the will and brought an ejectment, but a verdict was given for the defendants, it was, nevertheless, held by Lord Cottenham, that a purchaser

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[\*164]

But vendor showing a *prima facie* title need not answer any general questions;

and need not give explanations in respect of an adverse notice which has not been acted on;

but has under special circumstances been required to prove in equity a will already established by a verdict at law.

(r) 11 Ves. 468.

(s) *Pearse v. Pearse*, 1 De G. & S. 12, 16 and 17.

(t) *Green v. Pulsford*, 2 Beav. 70.

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Vendor need not disclose confidential communications.

Whether he must produce will as negative evidence of heir's *prima facie* title.

How far bound to furnish proof of intestacy.

\*could require the devisees to file a bill to establish the will against the heir.(u)

It has also been held, that the purchaser cannot require the vendor to disclose confidential communications made by him to his solicitors or counsel, or cases laid before counsel respecting the property, although the same were made and prepared merely on behalf of the vendor, and not during a suit, or during a dispute or after the threat of a suit.(v)

Where the title is derived through an heir who took possession upon the ground of the assumed invalidity of his ancestor's will, which professed to deal with the estate, a purchaser may require the production of the will or evidence of its contents :(w) so, on a sale by a devisee or party claiming under him, the purchaser may require the production of any subsequent will or codicil, or evidence of its contents :(x) what the rule may be in cases where a will is known to have existed, but there is nothing to indicate that it purported to affect the property in question, seems to be more doubtful ; the purchaser would, no doubt, be entitled to see either the original or the best evidence of its contents which the vendor had the means of supplying ;(y) but if none such could be procured, and, after making inquiries on the subject, no special grounds for supposing the estate to be affected by the will were found to exist, the purchaser, it is conceived, would be obliged to take the title.(z)

And it is the universal practice, where a descent has occurred within a recent period, to require proof of the ancestor's intestacy as respects the property offered for \*sale, even although no trace of a will appears on the title ; how far this can in strictness be insisted on, (except as respects evidence which the venter may have in his own possession or power,) is perhaps doubtful ; the length of

[\*166]

(u) *Grove v. Bastard*, 12 Jur. 385 ; 2 Ph. 619.

(v) *Pearse v. Pearse*, 1 De G. & S. 12.

(w) *Stevens v. Guppy*, 2 Sim. & St. 439.

(x) See, and consider, *Howarth v. Smith*, 6 Sim. 161.

(y) See *Cooper v. Emery*, Hayes on Conv. 573, 3rd ed.,

(z) See the remarks of V. C. Wigram, 2 Ha. 260.

time which may be considered sufficient to render such evidence unimportant must depend upon the state of the particular title: where an estate has been repeatedly sold or mortgaged, an interval of thirty or forty years is generally considered satisfactory. Chap. VIII.

And a purchaser is not entitled to copies of any instruments which are produced merely to negative a possibility, and which he could not have compelled the vendor to produce if they had not been in his possession. Purchaser cannot require copies of documents produced as negative evidence.

The unsupported statutory declaration of the vendor as to a matter of fact material to the title, and peculiarly within his own knowledge, is not such evidence thereof as a purchaser is bound to accept.(a)

The want of evidence of matters of fact, (other than documentary,) as well as of the existence of documents conferring a title, may, however, be supplied by presumption; and the rule laid down in *Emery v. Grocock*,(b) as to a purchaser being bound to presume whatever a judge at law would clearly direct a jury to presume, applies (it is conceived) generally, although not universally,(c) to questions of matters of fact between vendor and purchaser.(d) Want of proof of material facts may be supplied by presumption.

Thus, where, in 1801, an allotment under an inclosure act was made to A. in lieu of four acres of common field land, the court, in 1847, assumed, in the absence of evidence to the contrary, that the four acres formed part of five acres and a half of common land comprised in a deed dated in 1784;(e) but the vendor was held bound to make \*inquiries on the subject, and to produce the best evidence in his power of the five acres and a half having formed the only commonable land belonging to the allottee.(f) Presumption of identity of parcels. [\*167]

(a) *Hobson v. Bell*, 2 Beav. 17.

(b) *Supra*, p. 162; Madd. 54.

(c) See Sug. 444.

(d) See *Lapham v. Pike*, Rolls, 1831; cited in Atkinson on Marketable Titles, 397.

(e) *Major v. Ward*, 5 Ha. 604.

(f) *S. C.*, 12 Jur. 476. As to the identity of lands of ecclesiastical and collegiate corporations, see 2 and 3 Will. IV. c. 80; of enfranchised copyholds, see 4 and 5 Vict. c. 35, s. 21; and of lands charged with tithe commutation rent-charge, see 1 Vict. c. 69, s. 9. Evidence of modern

## Chap. VIII.

Of identity  
of indivi-  
duals.

So, also, where a person, whose name and description correspond with those of a person previously named in the title, deals with the property in a manner consistent with the supposition of the two being identical, such identity must, in the absence of any reasonable grounds for suspicion, be assumed by a purchaser; this doctrine seems to be supported by a decision in the case of the *Braye Barony*,<sup>(g)</sup> where it was held sufficient to identify A. [described in the ancient record, as of B.] with a person named A. in the pedigree, to show *aliunde* that the latter held land in B.

## Of seisin.

Seisin may be presumed from facts which tend to show that the ancestor or testator acted as if he were the owner of the premises; *e. g.*, the production of leases which he has granted, and which have been followed by possession or payment of rent,<sup>(h)</sup> or of a grant of an annuity by a person in possession, and which states that A. B. is the legal owner of the fee;<sup>(i)</sup> or the production of receipts for rent given to persons who are proved *aliunde*, (*e. g.*, by the production of land-tax assessments, entries in parochial rate-books, &c.,) to have been in the occupation of the premises, or by the declarations of such occupiers that they held of the party in question: but mere personal occupation, although sufficient to raise a presumption of title in ejectment,<sup>(j)</sup> does not appear to have that effect as between vendor and purchaser.<sup>(k)</sup>

[\*168]

Strips of waste lying beside an ancient highway or a river are, together with the soil to the middle of the way or river, presumed to belong to the owner of the adjoining inclosed lands:<sup>(l)</sup> this presumption however seems to arise only as between such owner and the lord of the ma-

usage is admissible upon the question as to what passed under ancient grants; *Duke of Beaufort v. Mayor of Swansea*, 3 Exch. R. 413.

(g) Cited Hub. on Ev. 465.

(h) See *Clarkson v. Woodhouse*, 5 Durn. & E. 412; *White v. Lisle*, 4 Madd. 214; *Welcome v. Upton*, 6 Mee. & W. 536.

(i) *Doc v. Coulthred*, 7 Ad. & El. 235.

(j) *Doe v. Penfold*, 8 Car. & P. 536.

(k) See 13 Ves. 122; Hub. on Ev. 131.

(l) 1 Jarm. Conv. by S. 79, and cases there cited; and, in particular, Lord Tenterden's judgment in *Steel v. Prickett*, 2 Stark. 463.



nor; and does not apply as between parties deriving title through different conveyances from a former owner of both the inclosed and waste land ;(*m*) and, even as against the Lord of the Manor, the presumption is rebutted by the circumstance of the strip communicating with a common or other large piece of waste ;(*n*) or by the fact that other adjoining strips, similarly circumstanced, are held adversely to the landowner.(*o*)

Chap. VIII.

And seisin being once proved, or presumed, will be presumed to have continued until the contrary is shown.(*p*)

Of continuance of seisin.

Intestacy, also, is a fact which, strictly speaking, does not admit of proof, but is merely matter of presumption; letters of administration are, in the absence of special circumstances, received by conveyancers as raising a sufficient presumption of intestacy; so, a will or probate of a will not affecting the estate in question nor putting the heir to his election, is received for the like purpose.

Of intestacy.

So, also, it will be presumed that persons who have acted in official capacities were duly appointed thereto.

Of official appointments.

(*q*)[1]

(*m*) *White v. Hill*, 6 Q. B. 487.

(*n*) *Grose v. West*, 7 Taunt. 39.

(*o*) *Doe v. Hampson*, 4 C. B. 267.

(*p*) *Cockman v. Farrer*, Sir T. Jones, 182.

(*q*) See, as to Inclosure Commissioners, *Casamajor v. Strode*, 5 Sim. 87, 98; 2 Myl. & K. 708; as to Churchwardens, *Ganwill v. Utting*, 9 Jur. 1081, Ex.

[1] In the case of all public officers, from the highest to the lowest, proof that they are reputed to be, or have acted as such, is sufficient, without the production of their appointments. 1 Phil. Ev. 226.

It has been held in Connecticut that a clergyman, in the administration of marriage, is a public officer; and his acts as such, in the celebration of marriage was admitted as *prima facie* proof of his qualification, without higher evidence. *Gosken v. Stonington*, 4 Conn. Rep. 209. Proof that an individual had executed and returned a writ directed to him as coroner, has been held sufficient evidence of his being commissioned as such without proof of his commission. *Young v. Com.*, 6 Binn. Rep. 88. The collector and trustees of a school district may be proved such, by their acts and reputation. *M<sup>c</sup>Coy v. Curtis*, 9 Wend. 17. And persons acting publicly as officers of a corporation, are presumed rightfully in office. *U. S. v. Danbridge*, 12 Wheat. 70; *All Saints' Church v. Lovett*, 1 Hall's Rep. 191. See also, *Porter v. Luther*, 3 Johns. Rep. 431; *Berryman v. Wise*, 4 Term Rep. 366; *Turner v. Fendall*, 1 Cranch, 117; *Ver-*

Chap. VIII.

Of person last entitled having been the purchaser and stock of descent.

So, it is conceived, that the statutory presumption \*that the person last entitled to land was the purchaser, and the stock of descent under the late Inheritance Act, would hold good as between vendor and purchaser ;(r) it is observed by Mr. *Hubback*, in his very valuable and elaborate work upon evidence,(s) that the presumption cannot safely be relied on by the conveyancer, because it might, after completion, be shown in litigating the title that such owner did not purchase but inherited the land, and that the vendor, though the heir of the immediate, was not the heir of the more remote ancestor ; this, no doubt, is true ; but in every case of *presumption* there is a like risk of the conclusion being shown to be unfounded: the question is, not whether the purchaser may not require the vendor to make inquiries, and, if possible, procure evidence on the subject ; for to this, as in the allotment case,(t) he would, no doubt, be entitled ;(u) but whether, if such inquiries prove unavailing, the statutory presumption can be got rid of: the question is one of no very general importance, for it can only arise in cases where the commencement of the title is evidenced merely by possession and acts of ownership ; and, even then, if forty years have elapsed since the death, any adverse claim must in all ordinary cases have been barred by the Statute of Limitations.

Presumption in matters of pedigree—of legitimacy of child born in wedlock.

Thus, also, (to come to matters of pedigree,) it is a general presumption of law that a child born in wedlock, even a day after the marriage,(v) is the child of the husband ; and this, although the parties have separated by voluntary agreement,(w) and the wife be living in adul-

(r) See 3 & 4 Will. IV. c. 106, s. 2.

(s) Page 121.

(t) *Major v. Ward*, 5 Ha. 604; *supra*, p. 166.

(u) Sug. 550.

(v) See Co. Litt. 244, a.

(w) *Parish of St. George v. St. Margaret*, 1 Salk. 123.

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*non v. East Hartford*, 3 Conn. Rep. 475 ; *Lessee of Willink v. Miles*, 1 Peter's C. C. Rep. 429 ; *Sawyer et al. v. Steele*, 3 Wash. C. C. Rep. 464. Cowen & Hill's notes, 449, 450, part 1.

tery : (x) but the presumption does not arise in the case \*of Chap. VIII.  
 a child born after an interval, exceeding the usual period  
 of gestation, since the date of a divorce *a mensa et thoro*; (y)  
 or, it is imagined, since the commencement of the suit in  
 the Ecclesiastical Court; the ordinary presumption is not  
 to be rebutted by circumstances which create only doubt How re-  
butted.  
 and suspicion; but it may be wholly removed by proper  
 and sufficient evidence, showing that the husband was,  
 1st, incompetent; 2ndly, entirely absent at the period dur-  
 ing which the child must in the course of nature have  
 been begotten, or 3rdly, only present under such circum-  
 stances as afford clear and satisfactory proof that there  
 was no sexual intercourse; (z) and it also seems that  
 where the interview between the husband and wife has  
 not been such as to raise an irresistible presumption of  
 the fact of sexual intercourse, the subsequent conduct (a)  
 of the parties may be referred to for the purpose of estab-  
 lishing the fact of non-intercourse; e. g., the circumstance  
 that the wife who was living in adultery concealed the  
 birth of the child, that the husband acted up to his death  
 as if no such child were in existence, and that the adul-  
 terer aided in concealing the birth and subsequently rear-  
 ed and educated the child and left it all his property by  
 his will : (b) the old doctrine of *quatuor maria* has been  
 long exploded. (c)

(x) *Bury v. Philpot*, 2 Myl. & K. 349; *Morris v. Davies*, 5 Cl. & F. 163; *Hargrave v. Hargrave*, 9 Beav. 555; *The Queen v. The Inhabitants of Mansfield*, 1 Ad. & E. N. S. 444.

(y) *Parish of St. George v. St. Margaret*, 1 Salk. 123.

(z) Per Lord Langdale, in *Hargrave v. Hargrave*, 9 Beav. 555. His Lordship puts another case, viz., that of "the entire absence of the husband, so as to have no intercourse or communication of any kind with the mother:" but this seems to be an unnecessary extension of what is above stated as the second proposition.

(a) But the evidence and declarations of either the wife or husband are inadmissible; see Hub. on Ev. 262, 383; and see 5 Cl. & Fin. p. 221; but see, also, *Hargrave v. Hargrave*, 2 Car. & Kir. 701.

(b) *Morris v. Davies*, 5 Cl. & Fin. 163; *Saye and Sele Barony*, 1 H. L. C. 507; and see *Bury v. Philpot*, 2 Myl. & K. 349; *Clarke v. Maynard*, 6 Mad. 364.

(c) See *Pendrell v. Pendrell*, 2 Stra. 925; and see, on the general subject, *Banbury Peerage Case*, 1 Sim. & St. 153; *Morris v. Davies*, 5 Cl. &

Chap VIII.  
Presumption  
of marriage.

\*So, where evidence of marriage cannot be procured, the deficiency may be supplied by presumptions arising either from cohabitation preceded by the usual preliminaries of marriage, or by the conduct and behaviour of the parties during cohabitation and by the general reputation of the fact of marriage; for instance, in the cases of the *Roscommon Earldom* and *Stafford Barony*,<sup>(d)</sup> the execution of marriage articles, and the grant of a royal license to the intended husband to marry his brother's widow, were respectively admitted as raising a presumption that the subsequent cohabitations had been preceded by marriage; so, in the case of the *Saye and Sele Barony*,<sup>(e)</sup> the fact of the cohabiting parties having visited with families of respectability was successfully relied on as raising a presumption of marriage; so, in *Lord Ochiltree's case*,<sup>(f)</sup> the baptism of a child as if legitimate was held to raise a like presumption: but where, as in Scotland, mere consent will constitute marriage, cohabitation, if in the beginning illicit, will continue to bear that character, unless it be clearly changed by the parties.<sup>(g)</sup>

Decisions, on such points, in Peerage claims, are it may be remarked, of higher authority between vendor and purchaser than similar decisions, even by the House of Lords, in adverse claims to property; inasmuch as, the claimant of a Peerage, like a vendor, is required to show not merely a better title relatively to any other, but to show that the title is absolutely and exclusively in himself.<sup>(h)</sup>

Presumption  
of death;

So, the mere *factum* of marriage being proved, the law will raise every possible presumption in favor of the existence of circumstances essential to its validity.<sup>(i)</sup>

as between  
vendor and  
purchaser;  
[\*172]

\*As between vendor and purchaser, no presumption of death arises from the mere fact of a person having been

Fin. 262; Hub. on Ev. p. 393 *et seq.*; *Saye and Sele Barony*, 1 H. L. C. 507.

(d) Cited in Hub. on Ev. p. 257; and see, in ejectment, *Doe v. Grazebrook*, 4 Ad. & El. N. S. 406.

(e) Cited in Hub. on Ev. 247.

(f) [A Scotch Peerage case,] Hub. on Ev. 249.

(g) *Lapsley v. Grierson*, 1 H. L. C. 498, 506.

(h) See Hub. on Ev. 63.

(i) *Piers v. Piers*, 2 H. L. C. 331.

unheard of for seven years;(j) nor can any precise period be fixed upon which will raise such a presumption; but every case must depend upon its own particular circumstances; for instance, in a case like that of the *President* steam vessel, never heard of after setting out to cross an open ocean like the Atlantic, the courts would probably at the end of seven years presume the death of all parties on board, even as between vendor and purchaser;(k) while they might hesitate, even after a very much longer period, to come to the same conclusion, between vendor and purchaser, in the case of a vessel supposed to have been lost in navigating an ocean thickly studded with islands, like the Pacific.[1]

(j) Hub. on Ev. 179.

(k) See *Sillick v. Booth*, 1 Y. & C. C. C. 117.

[1] In New York, if any person upon whose life any estate, or tenements depend, remains beyond sea, or absents himself from the state, or elsewhere, for seven years together, such person is accounted naturally dead, in any action concerning such lands or tenements, in which his death comes in question, unless sufficient proof be made in such case, of the life of such person. (1 N. Y. R. S. 749, sec. 6.) In New Jersey seven years absence from the state raises the presumption of death, which however, may be rebutted by proof that the absentee has been alive within that period. *Wambough v. Schenk*, 1 Penn. Rep. 229. In Pennsylvania, proof that a person has not been heard of for seven years, is sufficient to rebut the presumption of life; and the lapse of twenty four years, without proof of inquiry or other circumstances, is enough to warrant the presumption that a person, of whom nothing has been heard for that length of time, is dead. *Innis v. Campbell, et al.* 1 Rawle, 373. In South Carolina seven years absence from the state is ground, for presuming death. *Woods v. Woods' admr.* 2 Bay Rep. 476. In Massachusetts, the mere absence of a person from the state, without being heard from, for seven years, is sufficient to raise the legal presumption of death. *Newman v. Jenkins*, 10 Pick. Rep. 515. In Kentucky to justify the presumption of death after seven years absence, the person must be proved absent for that period, out of the country of his residence. *Spurr v. Trimble*, 1 Marsh. Rep. 278; *Hall v. Corn*, 1 Hardin's Rep. 479. Ignorance in a family of the existence of one of the children, who had gone abroad at the age of twenty two, unmarried, and had not been heard of for upwards of forty years is sufficient, with other circumstances, to warrant the presumption of his death without issue. *McComb v. Wright*, 5 John. Ch. Rep. 263; 15 Mass. Rep. 305; 1 Hayw. Rep. 373. See Cowen & Hill's notes part 1 p. 483. When a person leaves his usual home and place of residence, for temporary purposes, and is not heard of, or known to be living, for the term of seven years, the legal presumption is that he is dead. *Loring v.*

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as between  
adverse  
claimants  
to property.

[\*173]

Presumption  
as to time of  
death.

There have been many decisions upon the above point as between adverse claimants to property; for instance, the mere absence beyond seas of a mortgagor for thirty years without being heard of, was, in an old case, held sufficient to entitle the heir to redeem; (*l*) so, as between parties claiming under a will, the death of the legatee has been presumed from absence in America without tidings or reply made to advertisements for twenty-two years; (*m*) so, in the recent case of *Cuthbert v. Purrier*, (*n*) where a fund was set apart to answer an annuity to a native woman in India, of whom nothing had been heard since 1815, Lord Cottenham, in 1837, ordered payment of the principal to the party entitled subject to the annuity, without requiring any security to refund; (*o*) so, in *Dowley v. Winfield*, (*p*) (an administration suit,) V. C. *Shadwell* presumed "the death of a legatee who when of the age of seventeen, had deserted his ship at one of the Sandwich Islands, and had not been heard of for twelve years; and in a modern case his honor ordered payment out of court of a sum of money to the administrators of a person who had gone to America and had not been heard of for seven years. (*q*)

As respects the time of death, the presumption, in cases of adverse claims to property, is, that the absent party died at some time within the first seven years after he was last heard of; but there seems to be no settled rule of presumption as to the particular time at which death oc-

(*l*) *Masten v. Cookson*, 2 Eq. Ca. Abr. 414.

(*m*) *Rust v. Baker*, 8 Sim. 443.

(*n*) 2 Ph. 199.

(*o*) 2 Ph. see p. 200.

(*p*) 14 Sim. 277; and see *Watson v. England*, 8 Jur. 1062; 14 Sim. 28.

(*q*) *Dunsmuir v. Boulderson*, 5 Jur. 958.

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*Steineman*, 1 Met. Rep. 204. Vide 2 Stark. Ev. 457; 6 East, 85. But this presumption may be rebutted by counter evidence, or by a conflicting presumption. *Ib.* Vide 2 Campb. 113; 2 Barn. & Ald. 386. To justify the presumption of death from seven years absence, the absence must be from the country of the absentee's residence. 1 J. J. Marsh. 163.

curred ;(r)[1] this may be presumed from circumstances ; Chap. VIII  
*e. g.*, the fact of the party, when last heard of, being in a bad state of health, and having arranged to return to his friends in six months,(s) or the state of weather succeeding the departure from port of a ship which is never afterwards heard of ;(t) in *Dowley v. Winfield*,(u) the court, in the absence of any special circumstances, presumed that the legatee, who had left his ship in the spring of 1832, died before the death of the testator, which occurred in September, 1833 ; and the legatee's share was paid over to other parties on their giving security to refund : in *Cuthbert v. Purrier*,(v) the court ordered the entire accumulations of the annuity, from the time when the annuitant was last heard of, to be paid over to the party entitled subject to the annuity, on his giving his bond to refund.

So, also, on an adverse claim to property, the court will, Presumption as to survivorship.  
 from general circumstances, draw its own conclusions upon \*the question of survivorship between parties who are supposed to have perished at or about the same time.(vv)[2] [\*174]

(r) *Doe v. Nepean*, 5 B. & Ad. 86.

(s) *Webster v. Birchmore*, 13 Ves. 362.

(t) *Sillick v. Booth*, 1 Y. & C. C. C. 117.

(u) 14 Sim. 277.

(v) 2 Ph. 199, *supra* ; and see *Grissall v. Stelfox*, 9 Jur. 890, V. C. K. B. ; *Wilcock v. Purchase*, 9 Jur. 891, V. C. E.

(vv) *Sillick v. Booth*, 1 Y. & C. C. C. 121 ; see *Lapsley v. Grierson*, 1 H. L. C. 498 ; see, with reference to the question in the well-known case of *General Stanwix*, (Fearne's Posthumous Works,) *Satterthwaite v. Powell*, 1 Curt. 705.

[1] If a man depart beyond seas, and is not heard of after, whether, at the end of seven years, his death must be presumed to have occurred then, or at the time he was last heard of. *Godfrey v. Schmidt*, Cheves' Eq. Rep. 57. But, to quiet a title under twenty years' possession, the death of one who had gone beyond seas, and was never after heard of, was dated from his departure. *Id.* The presumptions arising from twenty years' possession, begin to run from the commencement of the actual possession ; not (as with statutory limitations,) from the time when a cause of action accrued to the contesting party. *Id.* Presumption, by lapse of time, against one who had been under a disability to sue, must rest on twenty years clear of the disability. But one beyond seas will not be considered as under any disability, so as to entitle him to a deduction of the seven years allowed him by law, for prosecuting his suit. *Id.*

[2] A father seventy years old, and his daughter thirty-three years old,

## Chap. VIII.

Rules upon,  
as between  
adverse  
claimants,  
how far ap-  
plicable as  
between ven-  
dor and pur-  
chaser.

Such presumptions, however, would not necessarily be made as between vendor and purchaser ;(*w*) and the above cases must be considered as guides, rather than as authorities, for the conveyancer ; in the case of *Dowley v. Winfield*, in particular, the presumption, not only of the time but even of the fact of death, (admitting its propriety for the purpose of enabling the court to distribute testamentary assets,) would evidently be of an extreme character if made upon a question of title ; the mere fact of a young sailor, who deserted his ship in the Sandwich Islands, not being heard of for twelve years, can scarcely, as a matter of common sense, be considered to raise a stronger presumption of his death, than would the lapse of an equal interval of time in the case of any other person of the same age respecting whose existence no inquiry whatever had been made : in such cases the court may be supposed to be (perhaps insensibly) influenced not only by a supposition that the party may be dead, but by the feeling that, if alive, he will probably never return to claim the property : it has, moreover, been observed in a recent case, by the same learned judge who decided *Dowley v. Winfield*, that the old presumption of death from absence is,

(*w*) See Sug. 444.

being on board a steamboat that was lost at sea, both perished in the same calamity, and no special circumstances were known which tended to prove that one died before the other. Held, that there was no legal presumption that either survived the other, but that it must be presumed that both died at the same instant. *Coye v. Leach*, 8 Met. Rep. 371.

B. and his wife perished on board of a steamboat at sea, by the explosion of one of the boilers, which shattered the vessel, and caused it to fall to pieces and sink in about half an hour. Upon evidence that Mrs. B. was seen, and was heard to call loudly for her husband immediately after the disaster, and that he was not heard to answer, nor was heard or seen at any time after the explosion ; held, that Mrs. B. had survived her husband. *Pell v. Ball's ex'rs*, Cheves' Eq. Rep. 99. Such general considerations as age, health, &c., may be resorted to, to aid conjecture ; but, where there is any evidence whatever, even though it be but a shadow, it must govern in the decision of the fact. *Ib.* It seems, where the benefits of survivorship were not mutual, the burthen of proof rests on the side of the party to whom the survivorship would have been beneficial. *Ib.*



owing to the increased facilities for travelling, becoming daily more untenable.(x) Chap. VIII.

Failure of issue is a negative fact of which no evidence, strictly speaking, is capable of being given; all that can be done is to prove facts which raise a presumption of the want of issue; this proof, according to Mr. *Hubback*,(y) "may consist" either of the testimony of living witnesses having the means of knowledge,(z) the declarations of deceased relatives, or family reputation otherwise established," and which appears to extend to indirect or circumstantial declarations,(a) and, (in conveyancing practice,) to include declarations or affidavits by persons acquainted with, although not actually members of the family;(b) "or of facts or circumstances irreconcilable with or opposed to the hypothesis that there are any legitimate descendants of the supposed ancestor;" such as facts which tend to show the celibacy of the party,(c) the non-mention of issue in wills(d) and other documents in which issue, if existing, would naturally be noticed, and the devolution of dignities or property upon the assumption of the want of issue. Presumption of failure of issue. [\*175]

Many cases have occurred in which the Court of Chancery has paid out of court money, the title to which depended upon the presumption that females of advanced age were incapable of having issue;(e) fifty-five appears to have been the earliest age at which such presumption has been acted on, the female being unmarried, and the parties receiving the money being required to enter into Presumption against aged females having future issue.

(x) See *Watson v. England*, 14 Sim. 28; see *Hemming v. Spiers*, 15 Sim. 550.

(y) P. 203.

(z) As to which see the late case of *Hemming v. Spiers*, 15 Sim. 550, (a case between vendor and purchaser;) and the cases upon peerage claims cited Hub. on Ev. p. 204.

(a) See cases on peerage claims, cited Hub. on Ev. p. 205.

(b) *Ibid.*, 230.

(c) See *Hemming v. Spiers*, 15 Sim. 550.

(d) *Hungate v. Gascoyne*, 2 Ph. 25.

(e) See *Leng v. Hodges*, Jac. 585; *Brown v. Pringle*, 4 Ha. 124, and earlier cases there cited; see the judgment in *Brandon v. Woodthorpe*, 10 Beav. 463, where the practice was admitted, although from other circumstances payment was refused.

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their recognizances to refund in the event of her marrying and having issue: in a late case, *f* where the woman was fifty-eight and unmarried, the V. C. *Shadwell* ordered payment without requiring any recognizance; we are not aware of any reported case in which a title dependent on such a presumption has been forced upon a purchaser, although, upon general principles, it seems that such a course would, if necessary, be adopted; it being a moral, and not a mathematical certainty, of a good title, which a purchaser can require from a vendor *(g)*; the courts do not appear to have ever acted upon a similar presumption in the case of a male, and there are obvious reasons why the doctrine should not be so extended.

B. & C. mar-  
ried, and  
certified by ex-  
tracts from  
parochial  
registers.

The ordinary evidence of the facts of birth, marriage, and death, *(h)* consists of certified extracts from the parochial registers, or from the general register, established by the 6 and 7 Will. IV. c. 86, and amended by the 1 Vict. c. 22: and by declarations as to the identity of the parties; the parochial registers are not, as a general rule, evidence of the time or order of birth, *(i)* although they may go far to enable the practitioner to form an opinion upon these points; nor do they seem to be evidence of the time of death, except so far as by showing that it must have occurred before the date of the burial, of which they seem to be evidence *(j)* and they are evidence of the time as well as of the fact of marriage *(k)*. Under the 6 and 7 Will. IV. c. 86, the birth or death, and not the baptism or burial, is the subject of registration: the date forms part of the entry required by the act, and certified copies of the entries are to be received as evidence of the birth, death, or marriage, to which the same relate *(l)* it may, however, be doubted whether a purchaser could be compelled to accept a certificate of death as evidence of the

*(f)* *Miles v. Knight*, 12 Jur. 606.

*(g)* 2 Atk. 19; see 12 Ves. 252.

*(h)* As to recital of death of *cestui que vie* in renewed ecclesiastical lease being evidence, *vide supra*, 154.

*(i)* See 1 Moo. & Rob. 389.

*(j)* Hub. on Ev. 184.

*(k)* *Doe v. Barnes*, 1 Moo. & Rob. 386.

*(l)* Sect. 38.

fact, unless some sufficient reason were given for the non-production of the certificate of burial :<sup>(m)</sup> extracts from non-parochial \*registers have long been received by conveyancers as evidence ; and by the 3 and 4 Vict. c. 92, the non-parochial registers deposited under the provisions of that act.<sup>(n)</sup> and certified extracts therefrom,<sup>(o)</sup> are made evidence in the courts of law and equity.[1]

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(m) See *Attorney General v. Culverwell, R.* cited in Hub. on Ev. 769 ; and *Leach v. Leach*, V. C. K. B., 8 Jur. 211 ; but see *Parkinson v. Francis*, 15 Sim. 160. In *Tomlins v. Tomlins*, 3 Jur. 167, the V. C. of England decided that the certificate of a District Registrar is not evidence under the act : in the later case of *Trail v. Kibblewhite*, 10 Jur. 107, the same learned judge is stated to have acted upon such a certificate ; but his attention does not seem to have been directed to the distinction between a District Registrar's, and the Registrar General's certificate.

(n) For a list of which see Hub. on Ev. p. 772.

(o) See sects. 11 and 13.

[1] The register of births and deaths kept by a religious society is evidence of death ; but, at common law, it must be proved. A copy, under the seal of the corporation, is not evidence. *Stoeper v. Whitman's lessee*, 6 Bin. 416. But, when the original is of a public nature, e. g. the records of the Reformed Dutch Church, in the city of New York, a sworn copy is admissible. 5 Cow. Rep. 237. In ejectment, a sworn copy of the records of the town of Stonington, in Connecticut, which contained the date of the marriage of the parents of the lessors of the plaintiff, at the time of their birth, was held properly receivable in evidence to prove their pedigree. 15 John. Rep. 223. A register-book of baptisms was refused as evidence of legitimacy, because the entry was made more than a year after it took place, by a minister, from the information of the parish clerk, the person making the entry not being minister where the baptism took place. For he was recording a fact not within his own knowledge ; and though the clerk made a memorandum at the time, this was no part of his duty as clerk, but a mere private entry. 8 Barn. & Cress. 813. A parish register of marriages, births, and deaths, kept pursuant to the N. Carolina act of 1715, is evidence to prove pedigree, and that the several persons whose pedigree is thus proved, are within the savings of the statute of limitations. 3 Murph. Rep. 47. A parish register stated the day of baptism and the day of birth ; and was produced to show the defendant was of age. But Lord Tenterden would not allow that part respecting the birth to be read, saying the register was only evidence of baptism. *Rex v. Clapham*, 4 Carr. & Payne, 29.

In Maine, a book was produced by a town clerk, which had been received by him from his predecessor in office, as an official record ; it purported to contain a record of births and marriages in such town, but contained no title or attestation of its character, nor any certificate showing by whom the entries in it were made ; held, that it was proper *prima fa-*

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How otherwise proved by declaration, &c.

In the absence of evidence of the above description, resort is necessarily had to evidence of a less formal

cie evidence to prove the age of a person named in it. 3 Greenl. Rep. 223; see *Martin v. Gunby*, 2 Harr. & John. 248; *Wedgewood's Case*, 8 Greenl. Rep. 75. In New York, sworn copies of such registers, when the original is of a public nature, have been held admissible. See 5 Cow. Rep. 237; 15 John. Rep. 226. In North Carolina, a registry of births, marriages and burials, kept pursuant to the statute, is legal evidence of marriages, births, etc., especially on questions of pedigree. And the court lay it down as a general rule, that a book kept by public authority is necessarily evidence of the facts recorded in it. 3 Murph. Rep. 47, 52. In Pennsylvania, a copy of the register of marriages, baptisms, and burials, kept in a parish in the Island of Barbadoes, certified to be a true copy, by the rector of the parish, and proved by the oath of a witness, taken before the deputy secretary of the island, and notary public (his hand-writing and office being proved,) has been received as good evidence of pedigree. *Kingston v. Lesley*, 10 Serg. & Rawle, 383. And a copy of a register of births and deaths of the people called Quakers, kept in England, proved to be a true one, before the lord mayor of London, has also been allowed as evidence in Pennsylvania, to prove the death of a person. *Hyam v. Edwards*, 1 Dall. Rep. 2. By a statute in that state, the register kept by any religious society, of births, marriages, and deaths, is declared good evidence. The act is silent as to the mode of proof, and therefore the common law mode, which is by a sworn copy, or the production of the original, must be resorted to. A certified copy, under the seal of the corporation, or religious society, is not admissible. *Slover v. Whitman's lessee*, 6 Binn. Rep. 416. A sworn copy from the register-book of the burials in Christ Church, Philadelphia, has been received in evidence to show the fact of the death of a person at the time. *Lewis v. Marshall*, 5 Peters' Rep. 470, 475, 476. In Louisiana, the register of baptisms and births is evidence, and, when shown to exist, precludes parol testimony. *Duplessis v. Kennedy*, 6 Lou. Rep. 231-242; *Fletcher v. Cavalier*, 4 Mill. Lou. Rep. 267. An alteration in such baptismal register, by erasing the word "natural," and writing over it the word "legitimate," has no effect in preventing the registry from being used to establish the period of birth, though the alteration be not accounted for. Otherwise, however, if the document were offered to establish the legitimacy of the person named. A register of burials is also evidence there; and, where a register of baptisms proved that a child was christened by the name of "Francisco Antonio," and a register of burials attested the interment of a person named "Francisco," and no question was raised in the inferior court, on the point of variance; held, that on appeal, the appellate court must consider the one whose death was attempted to be proved, to be the person whose death, according to the pleadings, it was important to establish. *Calis v. Oriol*, 6 Lou. Rep. 403. In Ohio, where the defendant, on a trial in ejectment, offered the deposition of the town clerk of New Milford, Connecticut, to prove the correctness of a copy of the records of that town, showing the time of the defendant's birth, the court held, that it must be further shown that the

character; such as declarations by members of the family,<sup>(p)</sup> whether such declarations be made expressly for the purpose of evidence, or consist of recitals in deeds or wills, statements in pleadings in chancery, &c.[1] Such evidence is inadmissible in court during the lifetime of the parties; but, in conveyancing, statutory declarations form the only available means of preserving the testimony of living witnesses, and, after their deaths, become admissible in court; and where such declarations by relations cannot be procured, conveyancers act upon similar declarations made by strangers who have been acquainted with the family, although such declarations are inadmissible in court,<sup>(q)</sup> unless made contrary to the proprietary or

(p) See the remarks of Lord Langdale, upon the value to be attributed to traditional evidence in pedigree cases, in *Johnston v. Todd*, 5 Beav. 599.

(q) *Johnson v. Lawson*, 2 Bing. 86; *Crease v. Barrett*, 1 Cr. M. & R. 928; *Casey v. O'Shaunnessy*, 7 Jur. 1140, P. C.

record copied was kept under the authority of law; that a sworn copy of a private paper is nothing, without proof of the original being executed; and, until it was proved that the paper copied by the clerk in this case as a record, was legally entitled to that character, it was inadmissible. *Richmond v. Peterson*, 3 N. Ham. Rep. 368.

[1] In ejectment, the plaintiff claimed under a provincial governor, through one of his two devisees. A deed executed by W. as the attorney of persons styling themselves, in the power of attorney (which was dated thirty years before the trial) heirs of the governor, which deed recited the seisin of the governor, the death of his devisee, and the descent of the estate from him, the devisee, to Elizabeth, and the heirship from her to those who gave the power, was received in evidence for the plaintiff, as part of the proof of pedigree; and, connected with others light proof, was holden sufficient. 4 Wend. 543. In a writ of entry, *sur dissiesin*, the tenant (defendant) claimed under one Daniel Mountjoy, the son of Daniel Mountjoy and Rebecca Stokes, the latter of whom, he alleged, was the daughter of Benjamin Stokes, whose seisin was proved. To show the pedigree of the younger Daniel, the tenant first proved a marriage in September, 1739, between one Daniel Mountjoy and Rebecca Stokes; and then a deed dated September. 1765, from one Daniel Mountjoy, expressed to be "of all his right and title in and to the real estate of his grandfather, *Benjamin Stokes*, or his mother, *Rebecca Stokes*." Possession has gone according to the deed, which, at the time of the trial, was sixty years old. This statement in the deed was holden *prima facie* evidence of Daniel Mountjoy, the grantor's descent from Benjamin Stokes. *Stokes v. Davies*, 4 Mason's Rep. 268.

Chap. VIII. pecuniary(*r*) interest of the declarant: so, statements of  
 entries in pedigree contained in letters, or entries in books, whether  
 books, &c.; \*religious or otherwise, (*s*) are admissible in court, if the  
 [\*178] handwriting be proved to be that of a deceased member  
 of the family: (*t*) so also, old statements of pedigree are  
 old pedi- held admissible, on account of their public exposure to  
 gree; and recognition by the family, even although they cannot  
 be distinctly attributed to any particular member of it:  
 inscriptions, e. g., monumental inscriptions, (*u*) a mural inscription in  
 &c. the parish church, (*v*) coffin plates, (*w*) inscriptions upon  
 the walls of the mansion house, (*x*) pedigrees hung up in  
 the mansion, (*y*) or preserved in the family library, (*z*) en-  
 tries in a family bible, or, it would appear, in any other  
 book which had been treated by the family as being in  
 the nature of a family register; (*a*)[1] so, also, a pedigree  
 presented by a third person to a member of the family,  
 and recognized by him, is admissible in proof of the rela-  
 tionship of persons therein described as living, and who  
 might be presumed to be personally known to him, even  
 although the general pedigree be inadmissible by reason

(*r*) See *Sussex Peerage Case*, 11 Cl. & Fin. 85, 112; *Loyd v. Wail*, 1 Ph. 61.

(*s*) See *Herbert v. Tuckal*, Sir T. Raym. 84; *Berkely Peerage case*, 4 Camp. 418; *Slane Peerage case*, 5 Cl. & Fin. 24; *Tracy Peerage*, 10 Cl. & Fin. 154.

(*t*) As to proof of which, see *The Filzwallter Peerage*, 10 Cl. & Fin. 193; *Tracy Peerage*, 10 Cl. & Fin. 154.

(*u*) See *Peerage Cases*, cited Hub. on Ev. 686; and see 10 Cl. & Fin. 154.

(*v*) *Slaney v. Wade*, 1 Myl. & Cr. 338.

(*w*) Hub. on Ev. 693.

(*x*) *Camoy's Barony*, 6 Cl. & Fin. 801.

(*y*) See 1 Myl. & Cr. 356.

(*z*) *Camoy's Barony*, 6 Cl. & Fin. 802; and see *Davies v. Lowndes*, 7 Sco. N. R. 141.

(*a*) See 2 Russ. & Myl. 163; *Hood v. Beauchamp*, 8 Sim. 26; *Slane Peerage case*, 5 Cl. & Fin. 24; *Berkeley Peerage case*, 4 Camp. 418.

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[1] In the United States, family bibles and inscriptions on monuments are familiar and well-settled media of proof in cases of pedigree. 8 John. Rep. 131; 5 Serg. & Rawle Rep. 251. A leaf torn from an old family bible, belonging to the father, was admitted to prove that those persons were his sons, under whom the lessor of the plaintiff claimed.

of its purporting to be collected from registers, wills, &c., and *history* : (b) but a case for the opinion of counsel seems to be inadmissible, as being generally drawn by the solicitor and not by the party himself, and being often framed with "a view to drive the opposite party to a reference, or for other purposes. (c)

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[\*179]

And it seems probable that such evidence is admissible to prove not only the facts of birth, marriage, and death, but also such collateral matters, *e. g.*, the local derivation of the family, as tend to show the identity of the parties. (d)

Whether  
admissible  
in proof of  
collateral  
matters.

All such evidence is generally admissible if made during existing, (e) or with a view to anticipated (f) litigation or controversy involving the point in question; it seems, however, that the mere fact of the declarant having a distinct object in view in making this declaration, *e. g.*, the prevention of disputes in a family, will not render the declaration inadmissible, although the object can only be gained by using the declaration in evidence : (g) and, in a peerage case cited by Mr. *Hubback*, (h) a pedigree transmitted by a father to his son with a view to induce him to make a claim to the peerage, which, however, never was made, was held admissible as evidence in favor of a party claiming through an elder branch of the family.

Such declarations must be made "ante litem motam" — extent of the rule.

Whether the mere existence of that state of facts which may lead to a controversy is a *lis mota* within the above rule, is doubtful : (i) [1] the modern authorities seem to be

(b) *Davies v. Lowndes*, 7 Sco. N. R. 141, 214.

(c) *Slane Peerage*, 5 Cl. & Fin. 40.

(d) See *Shields v. Boucher*, 1 De G. & S. 40, and cases there cited; and *Doe v. Davies*, 11 Jur. 607, 10 Q. B. 314; *Lloyd v. Waile*, 1 Ph. 61.

(e) 6 Ir. Eq. R. 348; see Taylor on Ev. 412.

(f) *Slane Peerage*, 5 Cl. & Fin. 23.

(g) See 2 Russ. & Myl. 164; *Berkeley Peerage Case*, 4 Camp, 418; *Slaney v. Wade*, 1 Myl. & Cr. 338.

(h) *Airth Earldom*, Hub. on Ev. 668.

(i) See *Davies v. Lowndes*, 7 Sco. N. R. 198, 214; and *Walker v. Earl Beauchamp*, and other cases there referred to; *Slaney v. Wade*, 1 Myl. & Cr. 338, *Monckton v. Att.-Gen.* 2 Russ. & Myl. 147; *Reilly v. Fitzgerald*, 6 Ir. Eq. R. 335.

[1] The American cases do not seem to be uniform concerning the quality of being *ante litem motam*, which the English court still consider

Chap. VIII. opposed to such a doctrine; it was held in *Slaney v. Wade*(j) that a copy of an ancient mural inscription was not rendered inadmissible in evidence by reason of its having been made at the time when it was known that, on the death of a tenant for life of the family estates, questions would probably arise as to who was entitled under a limitation in a will to the testator's right heirs.

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(j) 1 Myl. & Cr. 338.

essential to the character of hearsay evidence. See 8 John. Rep. 128; 1 Yeates, 17, 152; Swift's Evidence, 182; 4 Dall. 123; *Barr v. Gratz*, 4 Wheat. 220; 2 Hen. & Munf. 167; 1 Wheat. 6; 7 Cranch, 290; 1 Wash. 123; 2 Id. 146, 148; 4 Wash. C. C. Rep. 186. In *Chapman v. Chapman*, 2 Conn. Rep. 347, the court says: "When declarations are made for the express purpose of being given in evidence as to pedigree, they will not be received. If a person were to take a bible, and having the idea that it was afterwards to be produced in evidence, were to write down at once, the births and deaths of his children, such an entry would not be evidence. The declarations of a deceased member of the family are not to be admitted, unless it appears that they have been made under such circumstances that the relation may be supposed to be without an interest, and without a bias. If they were made on a subject in dispute, after the commencement of a suit, or after a controversy preparatory to one, they ought not to be received in evidence, on account of the probability that they were partially drawn from the deceased, to make his hearsay admissible, or perhaps intended by him to serve one of the contending parties." In Virginia, a woman named S. brought a suit for her freedom in 1772; and dying soon after, that proceeding was abated. Some twenty-five or thirty years after, one W., an old person, informed her son that S. was free, and her family also, in consequence of their Indian descent from their mother. In a suit, brought some years after the declarations made, by S.'s grandson to recover his freedom, W.'s son testified to those declarations of his mother, as to the plaintiff's ancestor, S. Held, that this hearsay evidence was not objectionable, on the ground that the declarations of W. were made *post litem motam*. *Gregory v. Baugh*, 2 Leigh, 665. In ejectment, the plaintiffs claimed as heirs of Mrs. E., deceased; the defendants, under a deed from her. The plaintiffs offered to prove their pedigree by a letter written by an aged member of their family, after the validity of the deed from Mrs. E. had been drawn in question; but it did not appear that the pedigree of the plaintiffs was then at all in controversy. The supreme court say, it is agreed that the rule which admits hearsay to prove pedigree, is qualified by the exception that declarations made *post litem motam*, shall not be received. But the controversy respected the validity of Mrs. E.'s deed, made while she was a feme covert. The *lis mota*, if it existed, was not who were heirs. The court, therefore, thought the exception did not apply; but the cause finally went off on another ground. *Elliot v. Pier-son's lessee*, 1 Peters' S. C. Rep. 328.



And declaration is not rendered inadmissible in evidence by reason of the declarant, and the party relying on his declaration, having been in the same situation with respect to the matter in question. (k)

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Declaration by party in the like interest inadmissible.

And, as against third parties, recitals in a deed are not evidence unless the deed was executed by some disinterested member of the family: (l) in a case where a conveyance by parties claiming as heiresses of the bodies of two female joint-tenants in tail recited their pedigree, this recital of their title by the then vendors was held to be no evidence against a subsequent purchaser, although the deed was thirty years old; there being nothing to show that the previous possession had been consistent with the pedigree: (m) but, in an ejectment case, where a person entitled in remainder joined with the tenant for life (who was her relation,) in selling the property, and the conveyance recited that she was the daughter of J. D., and the conveyance was executed by the tenant for life, the recital was held by the Court of Queen's Bench to be evidence of the fact, "no dispute having existed, and the parties having done that which they had a right to do if members of the family." (n)

Recitals, when evidence of pedigree.

Land tax, if not noticed in the agreement, is presumed to be a charge on the property: if stated to be redeemed, its redemption must be shown by the certificate of the commissioners, the receipt of the cashier of the bank of England, and memorandum of registration. (o)

Land tax—redemption of, how proved.

\*Tithe, also is a burden the existence of which is presumed in the absence of agreement: the law upon the subject is rapidly becoming less important under the pro- [181]

(k) *Monckton v. Att.-Gen.* 2 Russ. & Myl. 157; *Doe d. Tilman v. Tarver*, 1 Ry. & Mo. 141; *Doe v. Davis*, 11 Jur. 607; 10 Q. B. 314.

(l) *Slaney v. Wade*, 1 Myl. & Cr. 338; but see the judgment of the V. C. *contra*, 7 Sim. 614.

(m) *Fort v. Clarke*, 1 Russ. 601.

(n) *Doe v. Davis*, 11 Jur. 607; 10 Q. B. 314.

(o) See 42 Geo. III. c. 116, s. 38. As to the right of a remainderman to pay off the representatives of a tenant for life who redeemed the land tax out of his own money, see *Cousens v. Harris*, 12 Jur. 835. As to merger of redeemed land tax, see *Blundell v. Stanley*, 13 Jur. 998.

## Chap. VIII.

Commuta-  
tion of, under  
late act.

Decision of  
commission-  
ers conclu-  
sive if no  
appeal.

visions of the Tithe Commutation Act: *(p)* [1] the commissioners acting under which have power, in making their award, *(q)* to decide all questions as to the existence of any modus, or composition real or prescriptive, or customary payment, or any claim of exemption from or non-liability to payment of tithes; *(r)* and their decision, unless reversed on an appeal brought within three calendar months after its being notified in writing to the parties interested, or their agents, *(s)* is binding and conclusive; and no further time will be allowed by reason of the benefice becoming vacant, after the commencement, but before the expiration of the three months; *(t)* there are exceptions of tithes of fish and fishing, and of mineral tithes, of payments instead of tithes in the city of London, and of permanent rent charges payable in any city or town by custom or any local act of parliament; *(u)* but, with these exceptions, all questions as to the existence or amount of liabilities of this description will eventually depend, and do already as respects a great part of the country depend, upon the commissioners' award *(v)* for the particular district.

[\*182]

Composi-  
tion, modus,  
or exemp-  
tion, how  
proved.

\*As respects those localities in which the tithe has not yet been commuted, it may be sufficient to state shortly, that a composition real can be established only by direct or presumptive proof of its creation by deed before the 13

*(p)* 6 & 7 Will. IV. c. 71; and see supplementary acts, 7 Will. IV. & 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 & 4 Vict. c. 15; 5 Vict. c. 7; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104.

*(q)* And which, if purporting to be sealed with the seal of the commissioners, is made evidence by s. 3 of 6 & 7 Will. IV. c. 71.

*(r)* 6 & 7 Will. IV. c. 71, s. 45; and see 5 & 6 Vict. c. 54, s. 10.

*(s)* Sect. 46.

*(t)* *Homfray v. Scroope*, 13 Jur. 623.

*(u)* Sect. 90.

*(v)* 6 & 7 Will. IV. c. 71, ss. 52 and 66; and see 2 & 3 Vict. c. 62, s. 8.

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[1] The commutation of tithes in England and Wales is provided for, and in due time, with few exceptions, all lands will be absolutely discharged from tithes; and corn rent charges will be payable in lieu of them, with powers of distress and entry, and enjoyment of the land for securing them. And owners of both land and tithes, even tenants for life, are empowered to merge the tithes in the lands; and in Ireland tithes are abolished and rent charges substituted.

Eliz.;(w) and that, before the passing of the 2 & 3 Will. IV. c. 100, a modus could be established only by similar proof of its constant payment from the time of legal memory;(x) and that, to prove an exemption from tithe, it was necessary to show that the land had belonged to one of the greater monasteries, and was held by such monastery discharged from tithe at the time of its dissolution.(y) By the 2 & 3 Will. IV. c. 100,(z) a modus(a) or exemption may be absolutely established as against the crown or Duchy of Cornwall, or any lay person (not being a corporation sole,) or any corporation aggregate, whether spiritual or temporal, by proof of payment of the modus, or enjoyment of the land free from tithe, during 60 years next before the time of the demand, and as against any corporation sole, by proof of such payment or enjoyment during two successive incumbencies, (or sixty years, whichever shall be the longer period,) and three years after the appointment and institution or induction of a third incumbent;(b) but the act does not extend to cases where the modus or enjoyment can be referred to an agreement in writing; and in cases where, at the date of the act, the \*tithes were in lease by deed, or subject to a temporary composition in writing, a period of three years is allowed to the tithe owner after the determination of the term of demise or composition;(c) and the time during which the lands are held by the tithe owner are excluded

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Proof of, how far facilitated by 2 & 3 Will. IV. c. 100.

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(w) See *Estcourt v. Kingscote*, 4 Madd. 140; *Dent v. Rob*, 1 Y. & C. Ex. 1.

(x) See 1 Mac. & G. 261.

(y) 1 Hare, 203; and see 1 Mac. & G. 261; and *Barnes v. Stuart*, 1 Y. & C. Ex. 119.

(z) Amended by 4 & 5 Will. IV. c. 83.

(a) A custom for the lord of a manor to receive a tenth of all titheable matters in the manor, and to pay a yearly sum to the rector in lieu of tithe, is not within the statute; see *Knight v. Marquis of Waterford*, 15 Mee. & W. 419; see 11 Cl. & F. 653.

(b) Sect. 1; see, as to evidence under this section, *Stamford (Earl of) v. Dundar*, 9 Jur. 165; the shorter period of thirty years allowed by the act, during which there is only a *prima facie* and not an absolute claim, does not appear to be material as between vendor and purchaser; see s. 6 of Act.

(c) Sect. 4.

Chap. VIII. from the period of computation.(d) It has, after opposite judicial decisions,(e) been recently decided by Lord Cottenham, C., in conformity with the opinions of eight of the twelve Judges, that in order to bring land within the operation of the above act for the purpose of claiming an exemption from tithe, it is not necessary to prove its original capacity for exemption, by showing that it belonged to one of the greater monasteries:(f) the act, it may be observed, does not prevent a party from pleading a modus from time immemorial and proving it by the same evidence as he might have done before the statute.(g)

Tithes, how  
affected by  
Statute of  
Limitations.

The 3 & 4 Will. IV. c. 27, s. 2, which enacts that no person shall bring an action to recover any land, (which by section 1 includes tithes, unless belonging to a spiritual or eleemosynary corporation sole,) but within twenty years next after the right accrued, has been held by the Court of Exchequer not to prevent the tithe owner from recovering tithes as chattels from the occupier, although none have been set out for twenty years; but to be confined to cases where there are two parties claiming adverse estates in the tithes.(h)

Defects in  
title, when  
supplied by  
Prescription  
Act, and  
Statute of  
Limitations.  
[\*184]  
Title under  
Prescription  
Act to light.

Defects in the early title, or in the evidence thereof, are occasionally rendered immaterial by the 2 & 3 Will. IV. c. 71, and 3 & 4 Will. IV. c. 74.

\*Under the former (commonly known as Lord Tenterden's) act, a claim to light becomes absolute and indefeasible after twenty years uninterrupted enjoyment, unless such enjoyment be shown to have been by virtue of some consent or agreement expressly made or given for that purpose by deed or writing; and local customs to the contrary are expressly rendered inoperative.(i)

To rights of  
way and

Claims of right of way, water, watercourse,(j) or any

(d) Sect. 5.

(e) See *Salkeld v. Johnson*, 1 Ha. 196; S. C., 2 C. B. 749; and *Fellowes v. Clay*, 4 Q. B. 313.

(f) *Salkeld v. Johnson*, 1 Mac. & G. 242.

(g) *Stamford (Earl of) v. Dunbar*, 9 Jur. 165.

(h) *Dean and Chapter of Ely v. Cash*, 15 Mee. & W. 617; but see *Dean and Chapter of Ely v. Bliss*, 5 Beav. 574.

(i) *Salter's Company v. Jay*, 3 Ad. & E., N. S. 109.

(j) The same law seems to be generally applicable to natural and ar-

other easement, (except light,) become *prima facie* valid after twenty years' uninterrupted enjoyment, and cannot be defeated by mere proof of such enjoyment having commenced at any prior period ; but, until forty years' uninterrupted enjoyment, they remain liable to be defeated in any other way in which they might have been defeated before the passing of the act ; *e. g.*, "by proof of a grant, or of a license, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents during the whole time that it was exercised" : (k) after forty years' uninterrupted enjoyment they become absolute and indefeasible, unless proof be given of such enjoyment having been under some consent or agreement expressly given or made for that purpose by deed or writing ; (l) after the end of the twenty years, and before the end of the forty, a grant may still be presumed \*by a jury, (m) notwithstanding that the enjoyment is shown to have originated in an agreement by parol or writing not under seal. (n) [1]

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other easements except light.

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tificial watercourses; *Mayor v. Chadwick*, 3 Per. & Dav. 367; 11 Ad. & E. 571; unless the latter be made for particular and temporary purposes: see, as to mining adits, *Arkwright v. Gell*, 5 Mee. & W. 203; and see also *Wood v. Waud*, 3 Exch. R. 748; as to rights of fishing in natural watercourses, see *Lamb v. Newbiggin*, 1 Car. & K. 549; the presumption is, that each riparian proprietor has a right to fish the stream in front of his own land: see, on the general subject, the authorities cited in the judgment in *Wood v. Waud*, *ubi supra*.

(k) *Per* Parke, B., 1 C. M. & R. 219.

(l) Sect. 2.

(m) See 1 C. M. & R. 222.

(n) *Dewhurst v. Wrigley*, 1 C. P. Coop. 329.

[1] A prescriptive way must not only have existed immemorially, but the use must have been uninterrupted. Hence the plea of such a way is not supported if no period is shown of twenty years' continued use. Where one pleads the grant of a way by a lost deed, the plea must be sustained by proof of an uninterrupted use of more than twenty years, by virtue of the deed. 5 Pick. Rep. 421; 2 McCord, 445; 3 Bing. 115. To constitute a way by prescription, the use must have been adverse. Hence, where a way is reserved by deed, and the grantor and those claiming under him, have used it in a mode nearly corresponding to the terms of the reservation, though long enough to give a prescriptive title, the use must have been intended under the deed, not adverse, and therefore the

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To rights of  
common, &c.

Claims of rights of common and other profits *a prendre*, (o) become *prima facie* valid after thirty years' uninterrupted

(o) Liberty for grantee, *his heirs and assigns with servants* or otherwise, to enter upon lands, and there to hawk, hunt, fish, and fowl, held to be such; (*Wickham v. Hawker*, 7 M. & W. 63;) and see authorities there cited. A right to dig coal, or other minerals (*Paddock v. Forrester*, 3 Man. & Gr. 903) on another man's land, may be claimed by prescription; but an exclusive right to any particular stratum of mineral is a right to land, and must be so claimed, whether the mine be open or unopened. (*Wilkinson v. Proud*, 11 M. & W. 33.) Whether the right to the *sole and several* herbage and pasturage of land is within the act seems doubtful; see *Welcome v. Upton*, 5 M. & W. 398, 403.

right will be limited by the terms of reservation. 2 Met. Rep. 457. The practice of passing over uninclosed forest, common to all, is insufficient to give such right. 1 Bai. 58. If one neglects to remove a house wrongfully erected on his own land, and which obstructs a way belonging to him, this is no abandonment of the right of way. An erection of the house by himself might be an abandonment. 5 Verm. Rep. 215. A way had been uninterruptedly used for twenty years. Afterwards, it was used but little, and, in different years, three or four times obstructed, and some wide deviations had taken place from its original course. Held the right of way was not thereby lost. 3 McCord Rep. 194. In Massachusetts adverse occupation of more than twenty years raises a presumption of the extinguishment of a way; but this presumption may be rebutted. Non-user, or a tortious interruption for ten or twenty years, does not forfeit a right of way, if a previous immemorial usage is shown, or *a fortiori*, a right founded on express grant or exception. Non-user of a way for nearly forty years raises a violent presumption against the right. *Hoffman v. Savage*, 15 Mass. 130. In Pennsylvania, an occupation for twenty-one years adverse to, and inconsistent with a way, bars the right. Non-user for twenty-one years, has the same effect. 2 Whart. 123; 5 Whart. 584. In Connecticut, a long continued non-user is *prima facie* evidence of the release of a highway; as where the owner of the land kept up bars, for ninety years. 7 Conn. Rep. 125. In Maryland, adverse possession for more than twenty years, is not a conclusive bar to a right of way, but only raises a presumption against it. But the user of another route over the land, fortifies the presumption of release, arising from non-user of the former way. *Wright v. Freeman*, 5 Har. & John. 467. In New Hampshire, where a way has been used over twenty years, the presumption arising therefrom may be rebutted, by showing that the owner of the land has ploughed it within that time, at the same time denying the right of way, though not in the presence of the party claiming the right. *Barker v. Clark*, 4 N. H. Rep. 380. In South Carolina, a right of way is defeated only by an adverse and continued obstruction for five years. 3 McCord Rep. 194.

Whatever period of time the statute of limitations may prescribe, for enforcing a right of entry, an adverse enjoyment of a watercourse in any particular manner, for such period, will be presumptive evidence of a

enjoyment, and cannot be defeated by mere proof of such enjoyment having commenced at any prior period; but, until sixty years' uninterrupted enjoyment, they remain liable to be defeated in any other way in which they might have been defeated before the passing of the act; (p) after sixty years' uninterrupted enjoyment they become absolute and indefeasible, unless proof be given of such enjoyment having been under some consent or agreement expressly made or given for that purpose by deed or writing. (q)

From what has been previously said, it would appear that the period for which a vendor, in order to show a title under the act, must prove uninterrupted enjoyment, is as follows: viz., twenty years in the case of lights; forty

Period for which possession must be proved in evidence of title.

(p) *Supra*, n. (k.)

(q) Sect. 1. See *Welcome v. Upton*, 5 M. & W. 398.

grant. This doctrine was first laid down as law, in England, in the year 1761. See Angell on W. C. 77; 7 Wheat. Rep. 59. In Pennsylvania, one may gain a right to abut his dam upon another's land, by an actual possession of it, for that purpose, for twenty-one years. 5 Watt's Rep. 308. The ordinary prescriptive title to a water course can be gained only against individuals, not against the public. Hence, the exclusive use of a river, for twenty years, will not debar the public from using it as a highway, even though, during that time, it has been in a condition wholly unfit for such purpose. To affect the public right of navigation there must be either a legislative act, or an enjoyment, so very long continued, as to raise a presumption of one. See 3 Serg. & Rawle, 292; 4 Hen. & Munf. 57; 4 Mass. Rep. 522; 1 Conn. Rep. 362. A prescriptive right may be acquired to the flow of the water in a particular artificial channel, even though it is neither actually used, nor necessary for the mill erected. It is sufficient that the water has been accustomed to flow in this course, for twenty years. *Tyler v. Wilkinson*, 4 Mass. Rep. 405. After possession of a watercourse for sixty years, one may have a bill in equity against a mortgagee who has foreclosed, to quiet his title, without having established his right at law. *Hillary v. Waller*, 12 Ves. 271; *Finch v. Resbridger*, 2 Verm. 390. The right of using a water course, like other easements, may be extinguished by *unity of possession*. If, therefore, A. owns above, and B. below, on the same stream, and B. acquires the right of having the water flow to his land, through A.'s, and then A. purchases B.'s land, and diverts the water into its natural channel, C., a purchaser of B.'s land from A., cannot claim the artificial channel, because it was extinguished by unity of possession. Angell, 71, 72. The principle of extinguishment by unity of possession applies only to artificial channels, the right to which depends on prescription; and not to a natural water course, existing *ex jure nature*. See Hilliard on Real Property, vol. 2, p. 117, 118.

Chap. VIII. years in the case of ways, waters, watercourses, and other easements (except lights); and sixty years in the case of rights of common and other profits *a prendre*: but, in the second class of cases, where the land or water which is sought to be affected by the easement has, during the period of enjoyment, been held for life, or for any term [\*186] \*exceeding three years, the revisioner, notwithstanding the expiration of the forty years, has a period of three years from the determination of the particular estate in which to resist the claim ;(r) so that unless, (as can seldom be the case,) the vendor can show the title to the land or water, he cannot, by evidence of enjoyment, make a good title to the easement ;(s) and enjoyment which gives no title as against the reversioner, gives no title as against the owner of the particular estate.(t) As respects the easement of light, however, the case seems to be different; there being no similar reservation in the statute of the rights of reversioners.

Enjoyment must have been uninterrupted and as of right.

In all the above cases, (except that of a claim to light,) the enjoyment must have been uninterrupted,(u) "as of right," and must have been subsisting within, at most, a year before the commencement of the action in which it is relied on :(v) the claim, therefore, may be defeated by showing that, for the whole or a part of the period relied on, the enjoyment was by parol license, or was exercised by stealth or without the knowledge of the parties interested in opposing the claim,(w) or that the party exercising it was himself, during all or any part of such period, entitled to the possession of the property sought to be af-

(r) Sect. 8.

(s) See *Bright v. Walker*, 1 C. M. and R. 219.

(t) *S. C.*; and note, that as respects the *prima facie* title which is gained by a thirty or twenty years' possession, under sects. 1 and 2 of the act, the time during which there may have been any disability, or a subsisting life estate, is altogether excluded by sect. 7.

(u) *Onley v. Gardiner*, 4 M. & W. 500.

(v) See *Parker v. Mitchell*, 11 A. & E. 788; and *Flight v. Thomas*, 8 Cl. and Fin. 231.

(w) See *Bright v. Walker*, 1 C. M. & R. 219; *Tickle v. Brown*, 4 Ad. & E. 369; *Partridge v. Scott*, 3 M. & W. 220.



affected : (x) and in cases falling under sections 1, 4, and 7 Chap. VIII.  
 of the act, \*an enjoyment, as of right, may be proved,  
 by showing enjoyment for several periods, amounting to-  
 gether to the statutory time ; and that during the entire [\*187]  
 intervals between such periods, and between the last of  
 them and the action, (if such interval intervened,) the estate  
 sought to be affected was in the hands of a tenant for life  
 or for years exceeding three years. (y)

But, as respect the easement of light, the mere fact of Except in cases of light.  
 uninterrupted enjoyment for twenty years, otherwise than  
 by consent given by deed or writing, confers an absolute  
 title ; the enjoyment need not be as of right ; so that proof  
 of a parol license is immaterial ; (z) nor does the existence  
 of disabilities or particular estates make any difference : it  
 has, however, been recently determined by the Court of  
 Exchequer, that the enjoyment of the access of light must  
 have been in the character of an *easement*, distinct from  
 the enjoyment of the land sought to be affected ; so that  
 sixty years' enjoyment of lights looking out upon a garden  
 which the owners of the house had held during that pe-  
 riod, as tenants from year to year, was held insufficient to  
 confer a title. (a)

By interruption, it may be observed, is meant an ad- Interruption — what it is.  
 verse obstruction, and not a mere discontinuance of  
 user ; (b) but the question, whether a discontinuance was  
 voluntary or otherwise, is ~~one~~ for a jury ; (c) so that, as  
 between vendor and purchaser, it would seem to be neces-  
 sary to give evidence of (so near as may be) continuous  
 user. It has been recently decided by the House of  
 Lords, (d) confirming the decisions of the Courts of

(x) *Onley v. Gardiner*, 4 M. & W. 500 ; *Clayton v. Corby*, 2 Ad. & E. N. S. 813 ; *Clay v. Shackeray*, 2 Moo. & R. 244. As to the non-extinguishment of a necessary easement by unity of seisin, see *Pheysey v. Vicary*, 16 M. & W. 484.

(y) *Clayton v. Corby*, 2 Ad. & E. N. S. 813.

(z) *Mayor, &c. of London v. Pewterers' Company*, 2 Moo. & R. 409 ; *Flight v. Thomas*, 11 Ad. & E. 688, see p. 695.

(a) *Harbidge v. Warwick*, 3 Exch. R. 552.

(b) *Carr v. Foster*, 3 Ad. & E., N. S. 581.

(c) *S. C.*

(d) *Flight v. Thomas*, 8 Cl. & Fin. 231.

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Queen's Bench and \*Exchequer Chamber, that, under the 4th section of the Statute, which provides that no act shall be deemed an interruption unless submitted to or acquiesced in for one year, a party who has uninterruptedly enjoyed or used the easement or right for any period exceeding one year short of the term which would be sufficient to confer a statutory title, can, upon being disturbed in his enjoyment or user at any time within the last year of the statutory term, at once claim the benefit of the statute.[1]

[1] Though the right to the enjoyment of light originate in temporary permission of the adjoining owner, or mere usurpation of the party claiming the right, yet an enjoyment for twenty years affords presumptive evidence of an agreement, license, or grant, which cannot be rebutted by showing that the right claimed had no existence previous to the commencement of the twenty years. But the reversioner may show that the acquiescence was by his lessee; for this could not be prevented by the reversioner, unless his knowledge be shown, so that he could interfere; and though it may conclude the lessee who is not incommoded, and would not naturally give notice to his landlord, it ought not to bind the latter. And the presumption may be rebutted by showing that the adjoining proprietor was an infant or under coverture, or other personal incapacity to grant, when the user began; or that he was absent from the country, and therefore ignorant of that fact, and incapable of resisting; or that the party alleged to have authorized the easement, had only a particular interest as a life estate, and could not bind the reversioner. So non-user or abandonment will occasion the loss of the easement claimed; the presumption in such cases being that the right has been relinquished as need-less, or released for a valuable consideration.

The right to enjoy light is limited to the extent and manner of usage. Therefore, where the house lighted was a malt house, but was changed into a parish work house, requiring, and at first having, more light than the malt house; a fence built so as to reduce the light to its former quantity, was held not actionable, though it diminished the necessary light of the work house.

Twenty years peaceable enjoyment or possession of a private way, confers a presumptive title; the inference from such a long user being that the right passed to the person using it by a regular grant. And it seems a town may, by user, like an individual, acquire a private way for itself, though not for the public at large.

Evidence may be given to rebut the inference of a grant sought to be raised. It may be shown that the usage suffered interruption, or was allowed by the mere neglect, permission or indulgence of the owner; or had formed the subject of perpetual contest; or it may be accounted for on the ground of leave, favor, or otherwise, than as a claim or assertion of right. So it may be shown that the party was merely allowed to pass like other neighbors, without being confined to any particular track. So

By the 3 and 4 Will. IV. c. 27, the time within which proceedings can be commenced, at law or in equity,(e)

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Statute of  
Limitations,  
3 and 4 Will.  
IV. c. 27.

(e) Filing a bill, not service of subpoena, is the commencement of suit; *Coppin v. Gray*, 1 Y. & C. C. C. 205; *Morris v. Ellis*, 7 Jur. 413; *Purcell v. Blennerhassett*, 3 J. & L. 24; but see *Att.-Gen. v. Hall*, 11 Pri. 760: as to suit commenced and then abandoned, see *Bampton v. Birchall*, 5 Beav. 67, and see *Roche v. Cooke*, 12 Jur. 5.

the obstruction of the way, for only one year of the time, will defeat it. So it may be shown that the identity of the way is not fixed, but that the user has been fluctuating, and embulatory, changing with fields and fences. But the right of way should have been exercised with the owner's knowledge, or he cannot be affected. An agreement for a way by parol, is a mere license, revocable at the pleasure of the grantor. A right of way can be only by prescription or grant at common law. The use by a man, of a way to his land for less than twenty years, when his land is confiscated and granted to another, who continues the use until both make out the time, will not warrant the inference, because of the interruption by confiscation. Though it would be otherwise if the twenty years were made out by the successive enjoyment of ancestor and heir, vendor and vendee, &c.

Non-user for a long time, (probably twenty years) affords a presumption that a right of way has been released or surrendered. An agreement, by parol, to discontinue an old way, is but a license, and may be revoked.

The most important and difficult class of presumptive easements arises from the conflicting use of running water. The law declares that the natural purity and course and flow of the stream, shall not be so changed or modified by the act of one, as to injure any other proprietor, or impair his natural advantages. The common wants of all must be subserved, and an advantage given to no one, at the expense of any other. Every proprietor has a right to the use of the water flowing in its natural current, without diminution or obstruction. No proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon the proprietor above; the true test of the principle and extent of the use being, whether it is to the injury of the other proprietors, or not.

In Louisiana, priority of appropriation in mill owners, is recognized by positive law, as securing an exclusive right. The first erected mill takes an adequate supply of water from above, and is entitled to be kept clear of back water from below, upon the mere circumstance of its being first erected. But aside from this positive provision, the law of that state would be the same as the common law.

An exclusive adverse enjoyment of the water in any particular manner, for twenty years (or other time limiting ejectments, in the state where the

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for the recovery of any land,<sup>(f)</sup> (which expression includes all corporeal hereditaments, and also tithes,<sup>(g)</sup> ex-

(f) Or tithe deeds; see *Dean and Chapter of Wells v. Doddington*, 2 Coll. 73.

(g) *I. e.*, as between parties claiming adverse estates therein, but not as between tithe-owner and terre-tenant; *Dean and Chapter of Ely v. Cash*, 15 M. & W. 617; but see *Dean and Chapter of Ely v. Bliss*, 5 Beav. 574.

question arises) raises the presumption of a grant or license. And it makes no difference to what extent, or in what manner, such exclusive use may injuriously affect others, unless the act amount to a public nuisance. But the defendant's enjoyment must be exclusive, continuous and adverse, so much so that on a defence against a claim for land, it would satisfy the statute of limitations. Alternate enjoyment, the defendant now using the land for his pond, and now the plaintiff for agricultural purposes, will not raise the presumption.

After the prior occupant has enjoyed for full twenty years, in a particular mode, so as to raise the presumption, he is entitled to maintain his possession to an extent commensurate with the enjoyment. And this extent, which is an abridgment of the rights of others, must be limited by the evidence to the usage.

The presumption arising from a usage of twenty years, will not be rebutted though it appear to have commenced when the land through which the water is derived was in the occupation of a lessee, if twenty years have elapsed since the lease terminated.

If the enjoyment originated in a written agreement or lease, there can of course be no presumption made in favor of a more extensive claim than what the true construction of the contract shows. If the party have, within twenty years before suit brought, acknowledged the plaintiff's claim, though under a mistake of the right, the presumption of a grant is rebutted.

If the encroachment or erection be a public nuisance, no length of time will legalize it.

To complete the presumptive title, the adverse enjoyment must be continuous and uninterrupted for the whole term. An interruption may arise by a unity of seisin and possession. Thus, if A. and B. have adjoining closes, and H. conduct the water from B.'s close on to his own, enjoyed it in a particular manner for a less period than twenty years, and then convey his close in fee simple to B.; and B., after a few days' possession re-convey it to A.; after which A. enjoys the water in the same manner he had done before, for a period less, but with the former period, making more than twenty years, the interruption would be fatal.

A total non-user for twenty years affords presumption either of the extinguishment of the former presumptive right, in favor of some other adverse right; or where no such adverse right appears, then simply that the former has been surrendered, or that it never existed.

A unity of possession, though it generally extinguishes an easement, will not destroy the presumptive right to the use of water. So that where

cept tithes belonging to a spiritual eleemosynary corporation sole,) and any share, estate, or interest therein, or of any *rent*, (which includes heriots, and all services and suits for which a distress may be made, and all annuities and periodical sums of money charged upon or payable out of any land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole, *(k)* is restricted to a period of twenty years, *(i)* or, in case of continuous disabilities, *(j)* forty years, from the \*time at which the right to proceed for the recovery of such land or rent first accrued to the plaintiff, or to the party through whom he claims. *(k)*

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All actions, &c., to be commenced within at least forty years from accrual of rights to sue. [\*189]

The 3d section of the act fixes the time at which, in certain specified cases, the right shall be deemed to have accrued; these cases, however, are put merely by way of illustration, and not with the view of limiting the operation of the 2nd section; *(l)* the general principle seems to be, that when a party has been in possession or receipt of the profits of the land, or in receipt of rent, the right accrued at the time when he last held such possession or received such profits or rent; *(m)* while in the case of a party who has never had such possession or receipt, the

Right when deemed to have accrued in certain cases.

General rule.

*(k)* But not rent reserved on a demise, as between tenant and reversioner; *Grant v. Ellis*, 9 M. & W. 113.

*(i)* Sects. 2 and 24.

*(j)* See sects. 16, 17, 18 and 19. The 19th sect., which provides that Scotland, Ireland, and the adjacent islands are not to be considered beyond seas, applies to cases of residence in Ireland, &c., before the passing of the act, if the controversy do not arise until after the passing of it: *Ex Parte Hasell*, 3 Y. & C. 617.

*(k)* See sect. 1; and *Doe v. Edmonds*, 6 M. & W. 295.

*(l)* See *James v. Satter*, 4 Sco. 168.

*(m)* *Owen v. DeBeauvoir*, 16 M. & W. 547.

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a mill and dam of B., standing below A., of right flows back on A.'s mill, if A. should purchase the mill and dam below, and sell them to C., the latter would have the same right as B. had; for the union of possession in A. would not change the rights of the lower mill. And in such a case, where the right to flow the mill above was lost by a non-user for twenty years, and then A. purchased the lower mill, and sold it to C.; held, that the former right to flow being severed before A. purchased, no greater right passed to C. See Cow. & Hill's notes, part 1, notes 303, 304; 3 Kent's Com. 2d ed. p. 441, 445, 449.

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Administrator  
claims as  
from death.

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Express  
trust right  
accrues at  
date of con-  
veyance to  
a purchaser.  
Charities,  
whether  
within the  
Act.

right accrued at the time when he first became entitled (whether by descent, alienation, falling in of a remainder or reversion, forfeiture, devise,<sup>(n)</sup> or otherwise) to enter into such possession or receipt. A mortgagee may, however, recover the mortgaged land at any time within twenty years after the last payment of principal or interest, notwithstanding twenty years or upwards may have elapsed since his right to enter accrued under the mortgage deed.<sup>(o)</sup>

And as against an administrator time runs from the death of the intestate.<sup>(p)</sup>

\*And, in the case of an express trust,<sup>(q)</sup> the right does not accrue until a conveyance has been made to a purchaser for valuable consideration, and then only as against such purchaser and persons claiming under him; <sup>(r)</sup> whether or no a charitable trust is within this provision, or whether, as formerly, time is no bar when the purchaser has notice, seems to be doubted: <sup>(s)</sup> the provision does not seem to apply to a mere voluntary trust for payment

<sup>(n)</sup> See *James v. Saller*, 4 Scott, 168, 180.

<sup>(o)</sup> See 7 Will. IV. and 1 Vict. c. 28. In default of payment, time runs from date of mortgage deed, if there is no provision for quiet enjoyment by the mortgagor, until default in payment; *Doe d. Roynance v. Lightfoot*, 8 M. & W. 553: as to whether the mortgagee's *prima facie* absolute title by twenty years' possession is defeated by his having kept accounts of the rents received by him, and otherwise treated and considered himself as mortgagee, see *Baker v. Walton*, 14 Sim. 496. As to the case of an annuitant, see *Searle v. Colt*, 1 Y. & C. C. C. 36.

<sup>(p)</sup> Sect. 6.

<sup>(q)</sup> See *Francis v. Grover*, 5 Ha. 39; *The Commissioners of Donations v. Wybrants*, 2 J. & Lat. 182; *Hughes v. Kelly*, 2 Con. & L. 223; *Blair v. Nugent*, 3 J. & Lat. 661; *Ward v. Arch*, 12 Sim. 472; and *Gough v. Bull*, 12 Jur. 859: as to difference between a charge and a trust for payment of a sum of money out of real estate. Purchaser's liability for purchase-money is not an express trust: *Toft v. Stephenson*, 7 Ha. 1; a constructive trust may be barred by long acquiescence; *Ex parte Hasell*, 3 Y. & C. 617.

<sup>(r)</sup> Sect. 26; *Att.-Gen. v. Flint*, 4 Ha. 147.

<sup>(s)</sup> See 4 Ha. 153—155; and see, *Att.-Gen. v. Kerr*, 2 Beav. 420; *Att.-Gen. v. Brettingham*, 3 Beav. 91; in neither of which cases was the statute relied on; and see, 1 Dru. & W. 288, where Sugden, C., was of opinion that the act did not extend to charities; and see, 2 Dru. & W. 69; but in *The Commissioner of Charitable Donations v. Wybrants*, 2 J. & Lat. 182, the same learned judge held, although the opinion was extrajudicial, that charitable trusts were within the act.

of debts when the creditors are not in fact *cestuis que trust*, so as to be entitled to enforce the trusts: (t) in cases of fraud, time does not begin to run until the fraud was, or with reasonable diligence might have been, discovered; (u) but this is not to affect a *bona fide* purchaser for valuable consideration without notice of, or reason to believe in, the commission of the fraud.

Chap. VIII.  
Fraud.

The 7th section enacts, that the right of a person entitled subject to a tenancy at will is to be deemed to "have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; but it provides that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee. (v) In cases of express trust, a *cestui que trust* whose possession is consistent with the trust is, for general purposes, tenant at will to his trustee. (w) and the object of the above provision seems to have been, to preserve the legal estate of the trustee, which, under the old law, was secured by the necessity that possession should be adverse in order to take away the right of entry: however, in a recent case of *Doe d. Jacobs v. Phillips*, (x) the Court of Queen's Bench seem to have considered the trustee of a term was barred by the possession of his *cestui que trust*: the opinions expressed upon this point were, however, extra-judicial; for, admitting the *cestui que trust* to have been tenant at will, the trustee before bringing the action should have determined the

Tenancy at will.  
[\*191]

Mortgagor and cestui que trust.

(t) *Evans v. Bagwell*, 2 Con. & L. 612; and query, whether the 25th section applies to cases which fall within the 40th and 42nd sections; *Ib.* p. 618.

(u) Sect. 26, and *Lewis v. Thomas*, 3 Ha. 26. In the case of a firm, it has been held that the fraud of one member prevents time, under the 3 and 4 Will. IV. c. 42, from running in favor of his co-partners, although innocent of, and deriving no benefit from, the fraud: *Blair v. Bromley*, 2 Ph. 354.

(v) A purchaser let into possession before completion is *prima facie* a tenant at will within this clause; *Doe d. Stanway v. Rock*, 4 Man. & G. 30.

(w) See 1 Jarm. Conv. by S. 28; Sug. 610.

(x) 10 Q. B. 130.

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tenancy by notice, which he had not done :(y) but the Court of Common Pleas has since(z) refused to follow the dicta in *Doe v. Phillips*. Where the tenancy determined before the passing of the Act, the right of entry is to be considered as having accrued at the time of such determination ;(a) \*but where the tenancy was subsisting when the Act came into operation, the right is barred by the lapse of twenty years from the end of one year after the commencement of the tenancy.(b)[1]

(y) As to what conduct amounts to an admission of a subsisting tenancy at will, see *Doe d. Groves v. Groves*, 10 Q. B. 486.

(z) *Garrard v. Tuck*, 13 Jur. 871; and see *Young v. Lord Waterpark*, 10 Jur. 1, L. C.

(a) *Doe v. Thompson*, 6 Ad. & E. 721; *Doe d. Evans v. Page*, 5 Q. B. 767; 1 Dav. & M. 601; *Doe v. Bold*, 11 Q. B. 127; as to what amounts to a determination of a tenancy at will, see *Doe d. Bennet v. Turner*, 7 M. & W. 226; S. C. 9 M. & W. 643; *Doe d. Goody v. Carter*, 9 Q. B. 863.

(b) *Doe d. Dayman v. Moore*, 9 Q. B. 555; *Doe d. Goody v. Carter*, 9 Q. B. 863.

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[1] The Statute of 3 & 4 Will. 4, c. 27, to which reference is here made, enacts that when any right to make an entry or distress, or to bring an action to recover land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture, or breach of condition had happened. A right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates, in respect of which, such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent. When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred. When the right of a tenant in tail of any land, or rent, to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, for making an entry or



The right of a person entitled subject to a tenancy from year to year or other period, without any lease in writing,

Chap. VIII.

Tenancy from year to year.

distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action. When a tenant in tail of any land or rent, shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect, after, or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt, in respect of an estate, which shall have taken effect after or in defeasance of the estate tail) shall continue, or be in such possession or receipt, for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid; then at the expiration of such period of twenty years, such assurance shall be, and be deemed to have been effectual, as against any person claiming any estate, interest, or right, to take effect after or in defeasance of such estate tail. It is enacted that after the 31st day of Dec., 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued, to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then, within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person, making or bringing the same. In the construction of this act, the right to make an entry or distress, or bring an action to recover any land, or rent, shall be deemed to have first accrued at such time as is hereinafter mentioned, that is to say, when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession, or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession, or receipt, then such right shall be deemed to have first accrued, at the time of such dispossession, or discontinuance of possession, or at the last time at which any such profits or rent, were, or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest, who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the

Chap. VII. is to be deemed to have accrued at the end of the first year or other period, or last receipt of rent, which shall

person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured, by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt, by virtue of such instrument; and when the estate or interest claimed, shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued, at the time at which such estate or interest, became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled, by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken.

It is further provided that all actions of debt, for rent, upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and, also, all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *feri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute then or thereafter to be in force, that should be sued or brought at any time after the end of the then session of parliament, shall be commenced and sued within the time and limitation thereafter expressed, and not after; namely, the said actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt, or *scire facias* upon recognizance, within ten years after the end of the then session, or within twenty years after the cause of such actions, but not after; the said actions by the party grieved, one year after the end of the then session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of the then session, or within six years after the cause of such actions or suits, but not after; provided that nothing therein contained, should extend to any action given by any statute, where the time for bringing such action was, or should be, by any statute, specially limited. In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land, or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered; provided that nothing in this clause contained,

last happen.(c) It has been held, that the performance of Chap. VIII.  
a service for which distress might have been made, *e. g.*,

(c) Sect. 8.

shall enable any owner of lands, or rents, to have a suit in equity for the recovery of such lands or rents, on account of fraud, against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed.

If at the time at which the right of any person to make an entry or distress, or being an action to record any land or rent, shall have first accrued, according to the meaning of the act, such person shall have been under any of the disabilities hereinafter mentioned, that is to say, infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid, shall have ceased to be under any such disability, or shall have died. No entry, distress, or action, shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within *forty* years next after the time at which such right shall have first accrued, although the person under disability, at such time, may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

It is provided that the word "*land*," shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to *tithes*, and also to any share, estate, or interest, in them or any of them, whether the same shall be a freehold, or chattel interest, and whether freehold, or copyhold, or held according to any other tenure; and the word "*rent*" shall extend to all heriots, and to all services and suits, for which a distress may be made, and to all annuities, and periodical sums of money, charged upon, or payable out of any land except moduses or compositions, belonging to a spiritual or eleemosynary corporation sole; and the *person* through whom another person is said to claim, shall mean any person, by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the

Chap. VIII. sweeping the church and tolling the bell, amounts to payment of rent within the meaning of this section.(d)

(d) *Doe d. Edney v. Benham*, 7 Q. B. 976; as to the 8th section being retrospective, see *Doe d. Jukes v. Sumner*, 14 M. & W. 39.

word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors, or other persons, as well as an individual; and every word importing the singular number only, shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male.

In the United States, the tendency of legislation for the last fifteen years has been more and more towards the establishment of an uniform period of twenty years, for all real actions, and rights of entry. In Massachusetts, since 1839 the right of entry and of action, is limited to twenty years after the right accrued to the party, or those under whom he claims, or after the party, or those under whom he claims, have been seized, in case of disability (including absence from the United States) ten years are allowed. In New Hampshire, no one can enter, or have an action, prescription or claim for real property, unless upon seisin within twenty years; subject to the exception of disability arising from infancy, coverture, and insanity; from the removal of which, five years are allowed. In Rhode Island, uninterrupted, quiet, peaceable and actual possession for twenty years with a claim of ownership in fee simple, gives and makes a good title; subject to the right of any person under disability, to sue within ten years from its removal; and the right of a reversioner &c. to sue within ten years from the accruing of his cause of action. In New York, the right of suing for real property, is limited to twenty years. No entry is valid as a claim, unless an action is brought within one year, and within twenty years from the accruing of the right of entry. Ten years are allowed from the removal of disability, or death of the party disabled; not including *absence*, and *imprisonment* being confined to imprisonment on a criminal charge, or in execution upon conviction for a term less than life. In Maryland twenty years adverse possession is a bar. The usual disabilities are excepted. In Delaware, twenty years adverse possession is a bar; subject to the right to sue within ten years from the removal of disability. In Mississippi all entries and actions must be within twenty years, with a saving clause in favor of infants, femmes coverts and insane persons. Fifty years actual uninterrupted possession gives a perfect title. In Kentucky, the right of entry is limited to twenty years; writs of right upon the seisin of ancestors or predecessors, to fifty years; other possessory actions upon such seisin, to forty years; and actions upon one's own seisin to thirty years; with an allowance of ten years from removal of disability, including *absence from the state*. In Michigan, twenty years is the period of limitation. The Revised Statutes of Maine, fix the limitation at twenty years. In case of a sole corporation, five years are allowed after the death of the incumbent actually disseized, though twenty had elapsed before. The limitation in Vermont, is fixed

The acknowledgment in writing of title, given to the person entitled or his agent by the person in the actual possession or receipt of the profits of the land or receipt of the rent, is equivalent to such possession or receipt by the person so entitled: (e) as between the landlord and tenant the receipt of rent is equivalent to the receipt of the profits of land: (f) but the performance of a service for which no distress can be made, *e. g.*, keeping up a grindstone on the land for the use of the parties beneficially interested, (g) does not prevent the Statute from running in favor of the occupiers. [193]

Chap. VIII.

Right of action saved by acknowledgment of title;

or receipt of rent or services.

The possession, &c., of one coparcener, joint-tenant, or \*tenant in common, is not to be considered as the possession of one joint-owner does not save the

(e) Sect. 14. See, as to what is a sufficient acknowledgment, *Doe v. Edmonds*, 6 M. & W. 295; *Trulock v. Robey*, 12 Sim. 403; *Holland v. Clark*, 1 Y. & C. C. C. 151; *Fursdon v. Clogg*, 10 M. & W. 572; *Incorporated Society v. Richards*, 1 Dru. & W. 258; *Lewis v. Thomas*, 3 Ha. 26, 34; *Lucas v. Dennison*, 13 Sim. 584. Acknowledgment by trustee, in trust to sell for payment of debts and subject thereto in trust for A., or by his agent, is sufficient: *Lord St. John v. Boughton*, 9 Sim. 219; and see *Blair v. Nugent*, 3 J. & L. 674.

(f) Sect. 35.

(g) *Doe d. Robinson v. Hinde*, 2 Moo. & R. 441.

at fifteen years, and in case of disability, five from its removal. In Connecticut, the right of entry, is limited to fifteen years; and an entry is of no effect, unless a suit be brought thereupon within one year. Five years are allowed from the removal of disability. In New Jersey, the right of entry and also the right of action is limited to twenty years. In Pennsylvania, the right of entry and of action, is limited to twenty one years, with an allowance of ten years from removal of disability. In Virginia fifteen years are a bar to all rights of entry; and five years are allowed after the removal of any disability. In North Carolina an entry upon, or claim to, lands, is limited to seven years; allowing three years from the removal of disability, or in case of absence, eight years from the accruing of the claim. Possession under colorable title, bars the state. In South Carolina, the time of limitation is ten years. Seven years possession, in Georgia, is a bar to the right of entry and of action, allowing three years from removal of disability. In Alabama, the limitation is ten years, with five years after removal of disability. The limitation in Tennessee is seven years, with allowance of three years after removal of disability. The period of limitation in Ohio is twenty-one years. In Indiana, twenty years possession is no bar to an entry on land. In Missouri, entry and action are limited to twenty years; and ten years are allowed after the removal of any disability. (*See the Statutes of the several States.*)

## Chap. VIII

right of  
another.Estate in  
remainder,  
&c.—when  
time begins  
to run  
against.

sion, &c., of any other ;(*h*) nor is the possession, &c., of the younger brother, or other relation of an heir, to be considered the possession, &c., of such heir.(*i*)[1]

The right of a remainderman or reversioner accrues when his estate falls into possession ;(*j*) and this, although he may have waived a previous forfeiture ;(*k*) and although, in the case of a reversioner, he, or the person through whom he claims, may have been in possession previously to the creation of the particular estate :(*l*) but where the same person who is entitled to the particular estate, is also entitled to the immediate beneficial reversion, time will run against both estates even although there may be no merger.(*m*) Where rent amounting to 20s. *per annum* or upwards, reserved by a lease in writing, is received by a wrongful claimant, no fresh right accrues to the reversioner upon the determination of the lease ;(*n*) but, in order to bar the reversioner, there must be actual receipt of the rent by a wrongful claimant ; its mere retention by the tenant is immaterial :(*o*) the existence of a lease containing general words sufficient to comprise the property in question, but which was not intended to comprise it, and has not been acted on as respects such property, would not, it appears, prevent the statute from running :(*p*) and where the \*right of a person to an estate in possession is barred, the

[\*194]

(*h*) Sect. 12: this clause is retrospective: see *Culley v. Doe d. Taylerson*, 3 Per. & Dav. 539; 11 Ad. & E. 1008; *Doe d. Holt v. Horrocks*, 1 C. & K. 566; *Doe d. Daniel v. Woodruffe*, 13 Jur. 1013, H. L.

(*i*) Sect. 13.

(*j*) Sect. 3; see *Duke of Leeds v. Earl Amherst*, 2 Ph. 125.

(*k*) Sect. 4.

(*l*) Sect. 5; and see *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

(*m*) *Doe d. Hall v. Mouldsdales*, 16 M. & W. 689.

(*n*) Sect. 9: this provision is retrospective; see *Doe d. Angell v. Angell*, 9 Q. B. 328; see this case, also, p. 355, as to the construction of the word "rent" throughout the 9th sect.

(*o*) *Doe d. Davy v. Ozenham*, 7 M. & W. 131; *Chadwick v. Broadwood*, 3 Beav. 308; see, however, *Ex parte Jones*, 4 Y. & C. 466: as to rents of mines reserved *in specie*, see *Denys v. Shuckburgh*, 4 Y. & C. 42.

(*p*) See *Dean and Chapter of Ely v. Bliss*, 5 Beav. 574.

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[1] See *Bryan v. Hinman*, 5 Day's Rep. 211; *Marsteller v. McClean*, 7 Cranch, 156; *Caldwell v. Black*, 5 Ired. 463; *McRae v. Alexander*, 1 Dev. 321; *Moore v. Armstrong*, 10 Ohio Rep. 11.

right of such person, and of all parties claiming under him, Chap. VIII. to any future estate, is also barred, unless the land or rent is in the mean time recovered by some person claiming in right of some intervening estate :*(q)* where there was a limitation to husband and wife for their joint lives, with remainder to the heirs of the husband, who became bankrupt, the last limitation was held to be a future estate within the meaning of this section ; and the possession of the land by the surviving wife, although taken without legal proceedings, saved the right of the assignee of the husband.*(r)*

When a married woman and her husband join in a conveyance of her estate by an assurance which for want of a Fine or Statutory Acknowledgment is not binding on her, time will begin to run against her and her heirs only from the death of the husband, (if tenant by the curtesy,) or from her death in his lifetime (if they have no inheritable issue ;*(s)* but where there is no conveyance binding on the husband, but a mere abandonment of possession by husband and wife, it has been held that time will run against her from the date of such abandonment.*(t)*

By the 21st section it is enacted, " That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred : " and the 22d section, in effect, provides that time which has commenced running against a deceased tenant in tail, shall be counted as against persons claiming in respect of any estate, &c., which he " might lawfully have barred." Remainders expectant on an estate tail are barred when estate tail is barred.

The expression in each of these two sections " might [\*195] Time runs against the estate tail and the remainders. But tenant in tail must

*(q)* Sect. 20 ; and see *Doe d. Hall v. Mouldsdale*, 16 M. & W. 689—696.

*(r)* *Doe d. Johnson v. Liveasedge*, 11 M. & W. 517.

*(s)* *Jumpson v. Pitchers*, 13 Sim. 327 ; see Sug. 631 ; and *Neesom v. Clarkson*, 2 Ha. 163.

*(t)* *Doe v. Bramston*, 3 Ad. & E. 63.

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have been  
sui jure,  
semble.

lawfully have barred, seems to require personal legal capacity on the part of the tenant in tail to bar the remainders; from which this singular result would seem to follow, viz., suppose the right of a tenant in tail to accrue in possession when he is one year old, and that he attains twenty-one and dies the next day under no personal incapacity, the statute would run against remaindermen as from the time when his right first accrued; but suppose him to die just before attaining twenty-one, or to attain twenty-one an idiot or lunatic, and so to continue until his death, in such a case it would seem that remaindermen would be in no way affected by the above sections of the act. This construction, if it be a correct one, must, in many cases where land has been brought into settlement, materially interfere with the beneficial operation of the statute upon titles.

Base fee—  
when to  
become a  
fee simple.

The 23d section has been a good deal discussed in the profession: according to Sir *E. Sugden* its effect is, "that where a tenant in tail executes a deed enrolled under the 3 & 4 Will. IV. c. 74, which for want of the consent of the protector operates only to create a base fee, under which possession is obtained, the title will become good against those in remainder at the end of twenty years from the period when the tenant in tail, or his issue, could, without the consent of any third person, have barred the remainders over under the 3 & 4 Will IV. c. 74";(u) but it is not clear that the section has not a retrospective operation.(v)

[\*196]

\*Here, it may be observed, the same question arises as to the necessity for personal legal capacity on the part of the tenant in tail or his issue to execute a disentailing conveyance, as well as the non-existence of a protector, at the time when the statute is to begin to run.

And in the opinion of Sir *E. Sugden*, base fees which were created before the passing of the 3 & 4 Will. IV. c. 27, are, as a general rule, rendered unassailable by the 36th section of the act.(w)

(u) Sug. 632.

(v) See 1 Jarm. Conv. by S. 32.

(w) Sug. 634.



The right of a mortgagor to redeem(x) is to be barred at the end of twenty years from the mortgagee taking possession, or last giving a written acknowledgment of title; [1] the acknowledgment must be given to the mortgagor or some person claiming his estate, or the agent of such mortgagor or person; and the section has been held to be retrospective; so that where, before the act, a mortgage had

Chap. VIII.

Equity of redemption, when to be barred.

Acknow-  
ledgment.

(x) See sect. 28.

[1] The analogy between the right in equity to redeem, and the right of entry at law, is generally preserved; so that the mortgagor who comes to redeem against a mortgagee in possession, after the period of limitation of a writ of entry, must bring himself within one of the exceptions which would save the right of entry at law, or the time will be a bar to the redemption, and a release of it to the mortgagee may be presumed. The limitation at law and in equity is usually the same, with the allowance of the same time for disabilities. 4 Kent's Com. 186; *Elmendorf v. Taylor*, 10 Wheat. Rep. 168; *Little v. Rowton*, 1 Marshall, 519; *Dexter v. Arnold*, 3 Sumner's Rep. 152.

The period of limitation of a right of entry upon land, is thirty years in Mississippi; twenty-one years in Pennsylvania and Ohio; twenty years in Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, Alabama, Kentucky, Indiana, and Missouri; fifteen years in Vermont and Connecticut; ten years in Louisiana; seven years in North Carolina, Tennessee and Georgia; and five years in South Carolina.

In England, if a mortgagee enters in the life time of the tenant for life, the remainder-man will be barred of his right to redeem, after twenty years from such entry; the principle being, that the remainder-man might have redeemed, notwithstanding the life estate—and that it is of no consequence to the mortgagee who has the equity, for he ought to be quieted after twenty years' possession. 1 Sim. & Stew. 471.

"The mortgagee may equally, on his part, be barred by lapse of time; and if the mortgagor has been permitted to possess and enjoy the estate without account, and without any payment of principal or interest, or claim for a given period, and which is generally fixed at twenty years, the mortgage debt is presumed to be extinguished, and a re-conveyance of the legal estate from the mortgagee, may be presumed. The period of twenty years is taken, by analogy, to the period of limitation at law for tolling the entry of the true owner. The rule of barring the equity of redemption, or the claim of the mortgagee, by lapse of time, is founded on a presumption of title, which may be rebutted by parol proof, or circumstances sufficient to put down, or destroy, the contrary presumption." 4 Kent's Com. 189; *Moore v. Cable*, 1 Johns. Ch. Rep. 385; *Giles v. Baremore*, 5 Johns. Ch. Rep. 545; *Jackson v. Wood*, 12 Johns. Rep. 242; *Ross v. Norvell*, 1 Wash. 14; *Howland v. Skurtleff*, 2 Met. Rep. 26; *Whiting v. White*, Cooper's Eq. Rep. 1; *Reeks v. Postlethwaite*, Ib. 161; *Barron v. Martin*, Ib. 189; *Hughes v. Edwards*, 9 Wheat. Rep. 489.

## Chap. VIII.

been twice transferred, as such, by deeds to which the mortgagor was no party, and no acknowledgment of the equity of redemption had been given to him for seventeen years before the passing of the act, these years were counted against him upon his subsequently filing a bill to redeem : (y) an acknowledgment given to one of several mortgagors, or representatives of a mortgagor, operates in favor of all ; but an acknowledgment by one of several mortgagees, or representatives of a mortgagee, does not affect the proportionate interests of the others : (z) if a mortgagee while in possession is himself entitled to such possession in respect of a life or other limited interest in, or as a tenant in common of, the equity of redemption, the period for which he is so entitled will not be counted against the parties entitled, in remainder, or together with him, to the equity of redemption. (a)

If mortgagee is entitled to possession as being interested in equity of redemption, time does not run.

[\*197]

Time allowed for action, &c., by spiritual or eleemosynary corporation sole.

For recovery of advowson or right of presentation.

\*No spiritual eleemosynary corporation sole is to recover any lands or rents but within two successive incumbencies and six years, or sixty years, (whichever be the longer period,) from the time when the right accrued. (b)

No advowson is to be recovered, or right of presentation enforced, but within three successive adverse incumbencies, or sixty years, (whichever be the longer period,) reckoning therein incumbencies by lapse, but not incumbencies after promotions to bishoprics ; (c) and a patron claiming in respect of an estate in remainder on an estate tail, is, for the purposes of the statutory bar, to be considered as claiming through the person entitled to such estate tail : (d) successive adverse incumbencies extending over one hundred years form an absolute bar, unless the benefice has been since enjoyed under a rightful presentation ; and, in calculating this period a presentation adverse

(y) *Batchelor v. Middleton*, 6 Ha. 75.

(z) Sect. 28.

(a) *Raffety v. King*, 1 Keen, 601 ; *Tull v. Owen*, 4 Y. & C. 201 ; *Hyde v. Dallaway*, 2 Ha. 528 ; 2 Ph. 303.

(b) Sect. 29.

(c) Sects. 30 and 31.

(d) Sect. 32.

to the owner of a particular estate is considered adverse Chap. VIII.  
to remaindermen.(e)

No money charged upon, or payable out of any land or rent, nor any legacy,(f) is to be recovered, but within twenty years next after a present right to receive the same(g) shall have accrued to some person capable of giving a discharge for or release of the same; unless there has been some interim payment in respect of principal or interest, or acknowledgment of right given in writing;(h) \*from the above period must be excluded the time (if any) during which the person entitled to the charge has been also entitled to the possession of the land or rent:(i) and where a term was vested in trustees, in trust to raise portions for younger children, and subject thereto the estate was limited in strict settlement, it was held by Lord *Lyndhurst*, C., that the possession of the estate by the parties in reversion was consistent with the trust, and that the statutory bar did not apply.(j)

For recovery  
of money  
charged on  
land.

[\*198]

It has been held that a foreclosure suit is a suit for the recovery of money charged upon land, within the 40th section:(k) so, also, is a vendor's suit for the recovery of his unpaid purchase money:(l) it seems probable that the statutory bar would not apply, where the bill was filed

What suits  
are consider-  
ed to be such.

(e) See sect. 33.

(f) Which includes a residue or share of a residue; see *Christian v. Devereux*, 12 Sim. 264; see also *Phillipo v. Munnings*, 2 Myl. & C. 309; *Sheppard v. Duke*, 9 Sim. 567; *Prior v. Horniblow*, 2 Y. & C. Ex. 200; *Adams v. Barry*, 2 Coll. 290. Under the 36 Geo. III. c. 52, s. 27, a verified copy of the entry in the stamp office book, of payment of the duty on a legacy, is evidence of payment of the legacy; *Harrison v. Borwell*, 10 Sim. 380.

(g) See *Faulkner v. Daniel*, 3 Ha. 212. Legatees, whose legacies are charged on land subject to prior charges, held not to be affected by lapse of time while any prior charge subsisted.

(h) Sect. 40.

(i) *Burrell v. Lord Egremont*, 7 Beav. 206.

(j) *Young v. Lord Waterpark*, 13 Sim. 204; S. C. on appeal, 10 Jur. 1.

(k) See *Dearman v. Wyche*, 9 Sim. 570; and *Du Vigier v. Lee*, 2 Ha. 334; but see *contra*, *Wrizon v. Vise*, 2 C. & L. 138.

(l) *Toft v. Stephenson*, 7 Ha. 1.

## Chap. VIII.

before, although no decree was made until after, the passing of the act.(*m*)

For recovery  
of periodical  
payments.

Arrears of dower,(*n*) rent, or interest, are not recoverable for more than six years,(*o*) unless a prior incumbrancer has been in possession within one year before the commencement of the proceedings for the recovery of such arrears, in which case they may be recovered for the whole period of such possession;(p) that is, if the prior incumbrance affect the estate or interest upon which the subsequent incumbrance is a charge.(q) It was held by Sir J. Wigram, V. C., that if the interest on a mortgage debt is secured by bond or covenant, arrears for twenty years \*can be recovered as against the mortgaged estates;(r) but this decision, which was opposed to the opinion of Sir E. Sugden,(s) has been overruled:(t) the position of the grantee of an annuity charged on land, which has been duly paid, where the grantor has retained possession of the estate without acknowledgment of title, for a period exceeding the statutory limit, seems to be doubtful.(u)

[\*199]

Purchaser  
compelled to  
accept title  
depending on  
statute of li-  
mitations.

It has been decided, in Ireland, by Sugden, C., that a purchaser under a decree of the court can be compelled to accept a title depending upon adverse possession, verified, like any other fact, in the master's office;(v) and the general principle would probably be maintained by the English courts in a suit for specific performance. Its benefi-

(*m*) *Ravenscroft v. Frisby*, 1 Coll. 16.

(*n*) *Bamford v. Bamford*, 5 Ha. 203.

(*o*) Sects. 41 and 42; *Francis v. Grover*, 5 Ha. 39; the expression "rent," includes a fee-farm rent; *Humfrey v. Gery*, 7 C. B. 567.

(*p*) Sect. 42.

(*q*) *Vincent v. Goring*, 1 J. & L. 697.

(*r*) *Du Vigier v. Lee*, 2 Ha. 326.

(*s*) *Harrison v. Duignan*, 2 Dru. & W. 295; *Hughes v. Kelly*, 3 Dru. & W. 482.

(*t*) *Hunter v. Nockolds*, 1 Mac. & G. 640; *Humfrey v. Gery*, 7 C. B. 567.

(*u*) See *Searle v. Coll*, 1 Y. & C. C. C. 36: payment by executors and trustees in possession has been held binding as against the *cestui que use*: *Francis v. Grover*, 5 Ha. 39.

(*v*) *Scott v. Nixon*, 3 Dru. & W. 388: the verification was merely by affidavit; but the court expressly stated that the purchaser might, had he pleased, have insisted on a regular examination of witnesses: see p. 402.

cial application, as between vendors and purchasers, is, Chap. VIII. however, in the case particularly of missing instruments, materially affected by the difficulty which exists of determining the time when the right of action may have accrued to the supposed adverse claimants; for instance, where forty years have elapsed since the death intestate of a former owner seised in fee simple in possession, the statute may be safely relied on as against the claim of any latent heir, as his right of action must have accrued at the death: but, if the intestacy itself be in dispute, and there is reason to apprehend the existence of a will whose contents are unknown, here the statute is evidently a very slight protection; as limitations may have been created under which a right of action may exist for an indefinite period.

[\*200]. Possession under the act bars the right and not the remedy only.  
 \*Possession for a time exceeding the statutory limit, bars not only the remedy, but also the right of the original owner; (w) the effect of the act being to make a parliamentary conveyance of the land to the person in possession, after the statutory period has elapsed; (x) but possession, in order to transfer a valid title to any particular individual, must have been either by the same person, or by several persons claiming one from another: *e. g.*, if twenty persons, unconnected with each other, had been in possession, each for one year consecutively, for twenty years, it would be impossible to say to which of the twenty persons the act had transferred the title. (y) Rent payable out of land is extinguished by its non-payment during the statutory period; and time runs from the last actual receipt. (z)

As to the title which may be acquired as against the crown, and the crown's grantees, by adverse possession, it may be sufficient to refer to the acts of 21 Jac. I. c. 14, Adverse possession as against the crown.

(w) See s. 34; *Scott v. Nixon*, 3 Dru. & W. 388; *Burroughs v. McCreight* 1 J. & L. 290.

(x) *Per Parke, B.*, 14 M. & W. 42.

(y) *Doe d. Carter v. Barnard*, 13 Jur. 915; see judgment.

(z) *Owen v. De Beauvoir*, 16 M. & W. 547. As to the right of a lessor, at the expiration of the term, to encroachments made by the tenant during the tenancy, see *Doe d. Lloyd v. Jones*, 15 M. & W. 580, and cases cited.

Chap. VIII. and 9 Geo. III. c. 16.(a) The acts of 2 and 3 Will. IV. c. 71, and c. 100, seem to be binding on the crown.(b)

[\*201]

## \*CHAPTER IX.

### AS TO THE PRODUCTION AND EXAMINATION OF THE DEEDS.

1. *As to the place and time for, and expenses of, production of the deeds.*
2. *Production of—may be compelled by whom.*
3. *Non-production of—how far important.*
4. *Examination of—matters to be observed in.*

Deeds where  
to be pro-  
duced.

Expenses of  
inspection.

(1.) THE vendor may produce the deeds(a) for the purpose of verification, either at his own known residence,(b) or upon or in the immediate vicinity of the estate,(c) or in London;(d) and the purchaser in such cases pays for the necessary journeys of his solicitor; if the deeds are in London, a country solicitor must employ a town agent to examine them, and cannot charge for a journey for that purpose; unless his client, (knowing the practice of the profession to be the other way,) requests him to undertake it:(e) but a solicitor need not employ an agent in a country town to examine deeds, but may send a clerk.(f)

(a) And see 1 Jarm. Conv. by S. 52; and *Doe v. Roberts*, 13 M. & W. 520.

(b) See s. 1.

(c) As to the right, as between the parties to a settlement, to the custody of the title deeds of the settled estate, see *Reece v. Trye*, 1 De G. & S. 273, note (a.)

(d) Sug. 448.

(e) 1 Jarm. Conv. by S. 99.

(d) Sug. 448.

(e) *Alsop v. Lord Oxford*, 1 M. & K. 566; *Horlock v. Smith*, 2 Myl. & Cr. 523; *In re Tryon*, 7 Beav. 496.

(f) See *Hughes v. Wynne*, 8 Sim. 85.

And, where all the deeds cannot be produced at one of the usual places for production, the additional expenses of journeys thereby rendered necessary are borne by the vendor; (g) where the conditions of sale reserve to the \*vendor the option of producing the deeds at any one of several specified places, he must give to the purchaser reasonable notice of the place selected for the purpose; (h) if he have only a covenant for production, the purchaser may, it seems, require him to produce them, or at least to send his own professional adviser for the purpose of enforcing production; as it might be refused to the purchaser's agent. (i) In the case of a grant from the crown, it is sufficient if the vendor's solicitor inform the purchaser where it may be seen; (k) but, the vendor must produce office copies or extracts of proved wills and records, and cannot require the purchaser to examine the originals at the public offices. (l)[1]

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Extra expenses consequent on production at unusual place.

[\*202]

Notice of place.

Deeds producible only under covenant for production.

Grants from crown.

Instruments on record.

Examination of deeds before perusal of title.

The purchaser may, as we have already shown, examine the deeds before laying the title before counsel; and if the title prove bad, may recover the expenses from the vendor; (m) but, in order to do this, he must prove the existence of a valid contract for sale. (n)

(g) *S. C.*, Sug. 448: *quare*, whether the vendor can set off against the expenses of such journeys, the travelling expenses which the purchaser would have incurred had the deeds been produced upon the estate, or at the vendor's residence.

(h) *Rippingall v. Lloyd*, 2 Nev. & M. 410.

(i) *S. C.*, 419.

(k) Sug. 450.

(l) Sug. 449; but as to furnishing copies on completion, *vide infra*, Ch. XIII.

(m) *Hodges v. Lord Litchfield*, 1 Bing. N. C. 499.

(n) *Gosbell v. Archer*, 4 Nev. & M. 485.

[1] Where a certain place is appointed for performance of a condition, the party who is to perform must be at the place at the time appointed, and the other party is not bound to accept performance elsewhere. But, if he does accept, the performance will be good. Where no place is appointed for performance, a grantee, who is to perform the condition by payment of money, must seek for the other party, if he is in the country; but not if he is abroad. 1 Rolle's Abr. 444.

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(2.) *Production of deeds—may be compelled, by whom.*[2]

As to who may compel production of deeds on sale. Owner of undivided share.

Where an estate is held in undivided shares, the owner of any share may, in equity, compel the owner of any other share who holds the deeds to produce them for the satisfaction of a purchaser.(o)[3] \*

Of estate held under several titles created by single instrument. [\*203]

So, where estates are held in severalty under separate titles created by a single instrument,—as in the case of a settlement, exchange, or partition,(p)—the owner for the \*time being of any one such estate, or, it is conceived of any part of it, may enforce production of such instrument.[1]

Purchaser of portion of estate.

So, where a portion of an estate has been sold by the

(o) See 2 Mer. 490; Sug. 468.

(p) *Lord Banbury v. Briscoe*, 2 Ch. Ca. 42; Sug. 467; and see *Shore v. Collett*, G. Coop. 234; and *Attorney General v. Lambe*, 3 Y. & C. 162; S. C., at the rolls, 12 Jur. 386.

[2] In suits in equity, the court, as between the parties to the suit, does not order the production of the deeds, but on a very strong case of unanswerable equity. The defendant, the owner of the documents, never can be called on to give any reason why he should not produce them, for all must depend on the plaintiff's ground of application, and the defendant needs no other protection than the jealousy of the court.

[3] This is a most important branch of equity jurisprudence; and is exerted in all suitable cases of a public or private nature, in favor of persons entitled to the custody and possession of deeds and other writings. It may be traced back to so early a period as the reign of Edward IV. Mitford's Eq. Pl. by Jeremy, 117; *Armilage v. Wadsworth*, 1 Madd. Rep. 192.

[1] Where, however, the title to the possession of deeds and other writings, depends upon the validity of the title of the party to the property, and he is not in possession of that property, and the evidence of his title to it, is in his own power, or it does not depend upon the production of the deed or writings of which he prays the delivery; in such cases, he must first establish his title to the property at law before he can come into a court of equity for a delivery of the deeds. But, if his title is not disputed, relief follows, of course. Thus, heirs at law, devisees, and other persons, properly entitled to the custody and possession of the title deeds of their respective estates, may, if they are wrongfully detained or withheld from them, obtain a decree for a specific delivery of them. The same doctrine applies to other instruments and securities, such as bonds, negotiable instruments, and other evidences of property, which are improperly withheld from the persons who have an equitable or legal interest in them, or who have a right to have them preserved. Story's Eq. Juris. s. 703.



owner, who retains the deeds, the purchaser can, it appears, in equity, (g) enforce their production upon a re-sale; (r) unless there was an understanding to the contrary; which would probably be implied from the circumstance of the title not being required upon the original sale.

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Where an estate is in settlement, it appears that a contingent remainderman cannot enforce the production of the deeds for the purpose of effecting a sale or mortgage; (s) nor, as a general rule, can a vested remainderman compel their production except under special circumstances; the more remote the remainder the stronger doubtless must be the case made for production; the existence of lineal relationship between the tenant in possession and the remainderman would increase the difficulty; for the circumstance of the transaction being disapproved of by the ancestor (especially if he were the settlor) (t) would go far to show its impropriety; and the Court would refuse to aid a party who was seeking to do himself an injury: (u) even, however, as between father and son, the Court, it is conceived, might be so satisfied of the prudence and propriety of the particular arrangement as to depart from the general rule: (w) the strongest case in favor of the general right to production would seem to be that of a remainder in fee immediately expectant on an estate for life, with no relationship existing between the parties; where, it may be conjectured, the remainderman \*could enforce production for the purpose of a sale or mortgage, unless, from his youth or other special circumstances, the Court were satisfied it would best serve his interests by rejecting the application.

Contingent remainderman cannot

Whether vested remainderman can do so.

[\*204]

And, it is conceived, that where, as sometimes happens, A. and B. jointly purchase property, taking the conveyance so as to give to B. merely an estate in remainder, B.

Remainderman under a purchase-deed.

(g) But not at Law; Sug. 472.

(r) *Fain v. Ayers*, 2 Sim. & St. 533.

(s) *Noel v. Ward*, 1 Mad. 322.

(t) See Sug. 470.

(u) See *Shaw v. Shaw*, 12 Pri. 167.

(w) See *Lord Lempster v. Lord Pomfret*, 1 Dick. 238.

**Chap IX.** has a general right to the production of the muniments of title.[1]

Mortgagee need not produce deeds until paid off;

unless he claim under party who himself is liable to produce them.

Solicitor's Men.

A mortgagee is not, in general, bound to produce the deeds until he is paid off,(x) even although the devisee of the mortgaged estate may be ignorant of all particulars relating to the security;(y) since, however, a person can give no right which he does not himself possess, the mortgagee of a person who would be liable to produce the deeds must himself produce them at the suit of those persons who could compel their production as against the mortgagor;(z) but he would not be justified in so producing them except with the consent of the latter, or under an order of the Court.(a) So, the solicitor of a mortgagee has no lien upon the deeds, as against the mortgagor, to an amount exceeding what is due on the security.(b) If the solicitor of the mortgagor induce the solicitor of the mortgagee to part with the deeds, by a \*verbal undertaking to pay a sum claimed to be due for costs, such undertaking will be enforced summarily upon motion.(c)

[\*205]

(x) See *Sparke v. Montrieux*, 1 Y. & C. 103; *Addison v. Walker*, 4 Y. & C. 447; *Greenwood v. Rothwell*, 7 Beav. 291; *Damer v. Lord Portarlington*, 15 Sim. 380. Lord Kenyon is said to have advised a mortgagee to put his deeds into a box, and sit upon it, until the money was put into his hands; see 1 Y. & C. 107.

(y) *Browne v. Lockhart*, 10 Sim. 421; see *Crisp v. Platel*, 8 Beav. 62.

(z) *Balls v. Margrave*, 4 Beav. 119; and see *Hercy v. Ferrers*, *ib.* 97; see also a singular case of *Muston v. Bradshaw*, 10 Jur. 402; 15 Sim. 192; where it was held that a purchaser could not make the vendor's wife a defendant to a suit for specific performance, on the ground of her having possessed herself of the deeds.

(a) *Lambert v. Rogers*, 2 Mer. 490.

(b) *Hollis v. Claridge*, 4 Taunt. 807; see *Wakefield v. Newbon*, 6 Q. B. 276; and *Rider v. Jones*, 2 Y. & C. C. C. 329.

(c) *In re Gee*, 2 Dowl. & L. 997.

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[1] Remainder men and reversioners, and other persons having limited or ulterior interests in real estate, have a right, in many cases, to come into equity to have the title deeds secured for their benefit. But in all such cases, the court will exercise a sound discretion as to making the decree. To entitle the party to seek relief, it must clearly appear, that there is danger of loss or destruction of the title deeds in the custody of the persons possessing them; and also, that the interest of the plaintiff, is not too contingent, or too remote to warrant the proceeding. Story's Eq. Juris. sec. 704.

A mortgagee who consents to a sale by the Court, must bring the deeds into the Master's office in the usual way,<sup>(d)</sup> and it is conceived, that, in an ordinary case, a mortgagee who has countenanced a mortgagor in selling under the expectation of his concurrence, would not be allowed to stop the sale by refusing to produce the deeds before actual payment.

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Mortgagee  
consenting to  
sale by  
Court must  
produce  
deeds.  
Case of mort-  
gagee coun-  
tenancing  
sale by mort-  
gagor.

A mortgagee who has, even although insane, destroyed,<sup>(e)</sup> or has negligently lost<sup>(f)</sup> the muniments of title, will, it seems, be compelled to replace such as can be replaced; and as respects originals which cannot be replaced, will be required either to give an indemnity or to make compensation for the damage thereby done to the estate; but a mortgagee taking the same care of the deeds forming his security as he took of his own, ought not, it would seem, to be severely dealt with if they are accidentally lost.<sup>(g)</sup>

Liability of  
mortgagee  
for loss or  
destruction  
of deeds.

### (3.) *Non-production of deeds—how far important.*

The non-production of the deeds is material, not only as it deprives the purchaser of the usual means of verifying the title deduced upon the abstract, but as inducing a suspicion that they may have been deposited by way of equitable mortgage; it has even been held, on a sale of a public-house in London, that their non-production amounted to notice to a mortgagee of such a deposit \*with the brewers who supplied the house;<sup>(h)</sup>[1] this decision

Importance  
of non-pro-  
duction of  
deeds.

May affect  
purchaser  
with notice  
of their  
deposit.

[\*206]

(d) *Livesey v. Harding*, 1 Beav. 343.

(e) *Hornby v. Matcham*, 16 Sim. 325.

(f) *Lord Middleton v. Eliot*, 15 Sim. 531.

(g) *Woodman v. Higgins*, 14 Jur. 846, V. C. K. B.

(h) *Whitbread v. Jordan*, 1 Y. & C. 303.

[1] Mr. Baron Alderson in deciding this case, laid it down, that where a party having knowledge of such facts as would lead any honest man to make further inquiries, does not make, but, on the contrary, studiously avoids making such obvious inquiries, he must be taken to have notice of those facts, which if he had used such ordinary diligence, he would readily have ascertained. He is not, indeed, bound to an extraordinary circumspection, nor, on the other hand, is it necessary to make out express fraud on his part. If he be grossly negligent in omitting to inquire, it is, at all events, quite sufficient to fix him with notice; for as it is well laid

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has been disapproved of; (i) and has been thought to depend upon the presumed notoriety of the practice of London publicans so to deposit their deeds, and upon the fact of the mortgagee having been aware that the publican was indebted to the brewers; in fact the Court thought that there was wilful blindness, the security having been taken for the re-payment, not of a cotemporaneous advance, but of a sum already due: (j) however, in a very recent case, it was held by Sir *L. Shadwell*, V. C., that the omission to ask for the deeds was sufficient to postpone a mortgagee who took a conveyance of the legal estate by way of security for a pre-existing debt, although it did not appear that he was aware of the mortgagor being indebted to the prior incumbrancer. (k)

(i) See 4 Y. & C. 563; Sug. 1054.

(j) 1 Ph. 255.

(k) *Worthington v. Morgan*, 16 Sim. 547; 13 Jur. 316; where it appears that the security was for money previously due.

down in 1 Eq. Ca. Abr. 331, pl. 7, the purchaser who cannot make out a title but by a deed, which leads him to another fact, shall be presumed cognizant thereof, for it is *crassa negligentia* that he sought not after it. "This, however," says Sugden, (Sug. on Vend. vol. 3, p. 332,) "is an extension of the rule which we should be cautious how we act upon, in practice. It will probably tend to encourage mortgages by deposits; for in every case, whether the estate be freehold or copyhold, a prudent purchaser would inquire for the title deeds, and if he do not, he may, upon the authority of *Whilbread v. Jordan*, be fixed with notice of a deposit of them. But the rule of equity not to relieve against a purchaser having the legal estate, is not confined to a prudent or wary purchaser, but to a *bona fide* one without notice. It could hardly be maintained that a deposit of deeds is, of itself, implied notice to a subsequent purchaser or mortgagee, who, acting *bona fide*, but not cautiously, does not inquire after the deeds. In such a case, both parties have acted without prudence; one has taken a deposit of the deeds, without a conveyance; the other has obtained the conveyance without the deeds; and each, in the absence of fraud, is at liberty to make the best use he can of his imperfect title. These observations do not apply to a case where no inquiry is made, in order that the fact of the deposit might not be disclosed. It has often happened, in purchases of small portions of a large estate, that the purchasers, considering the sales as an accommodation to them, have not ventured to ask for more than a conveyance, and yet, it never occurred to any one that the resting content with a mere conveyance, gave such a purchaser implied notice of any deposit of the deeds, although it, of course, left him subject to all the existing incumbrances, as far as by their own force, they could be established against him. There appears to be a disposition to carry this doctrine too far."

(4.) *Examination of deeds—matters to be observed in.*

In the examination of the abstract with the documents, the most scrupulous care is requisite on the part of the solicitor; the object of the examination is to ascertain, 1st, that what has been abstracted is correctly abstracted; 2nd, that what is omitted is clearly immaterial; 3rd, that the documents are perfect, as respects execution, attestation, indorsed receipts, registration, stamps, &c.; and 4th, that there are no indorsed notices, nor any circumstances attending the mode of execution, attestation, &c., &c., calculated to excite suspicion: (l) anything out of the ordinary course—such as the unusual position of the \*indorsed receipt, (m)[1]—should be made the subject of inquiry; every part of every document ought to be read through; notice of an incumbrance is equally notice whether contained in one or in another part of a deed: (n) perhaps few of the most important duties of a solicitor are so frequently performed in a perfunctory manner.

Points to be attended to in comparing abstract with the deeds.

[\*207]

(l) See *Kennedy v. Green*, 3 Myl. & K. 699.

(m) See *Kennedy v. Green*, 3 Myl. & K. 699.

(n) See *Smith v. Capron*, 7 Ha. 189.

[1] In the case here cited, an attorney fraudulently obtained a conveyance from his client without consideration, and without her being aware that she had transferred her interest, and he afterwards mortgaged it to a relation, who advanced money upon it *bona fide*, and without actual notice, and employed no other solicitor, and swore in his answer that he acted for himself; Held that the attorney acted in that character for his relation, the mortgagee, and that he was bound by the notice, which, as it happened, the deeds, upon the face of them, would have imparted to a solicitor, if he had used reasonable diligence. The court held that if the purchaser or mortgagee had employed no solicitor, he would still have been bound; because although his own knowledge would not have led him to inquire, yet a man is not to avoid the consequences of a want of due diligence by stating that he has neglected those means which would have been required, if he had used reasonable precaution. There was an appeal, but upon this point it was unnecessary for the court above, to give any opinion, as the solicitor was held to have acted in that character for the mortgagee. It was, however, strong doctrine to hold, in a case where the plaintiff, who sought relief against the mortgagee, had, by culpable negligence, executed a conveyance to the very solicitor, without being aware of the nature of the act.

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AS TO MATTERS ARISING BETWEEN DELIVERY OF ABSTRACT AND PREPARATION OF CONVEYANCE.

1. *Time when essential at Law and in Equity.*
2. *Objections to title—negotiations upon the waiver of—when possession taken amounts to waiver.*
3. *General rights and liabilities of purchaser in possession.*
4. *Vendor in possession—alteration of property by—may avoid contract.*
5. *As to entry and possession by Railway Companies before completion.*

Time essential at Law,

(1.) AT Law, the time fixed for completion is of the essence of the contract ; and the purchaser may recover his deposit unless the vendor can deduce and verify a marketable title and give a conveyance at the time agreed on ;(a) if no time be fixed, a reasonable time must be allowed ;(b) and it has been held that a condition that the purchase-money shall be paid on a certain day, does not amount to a stipulation that the title shall be made out on or before that day.(c)[1]

(a) Sug. 264.

(b) *Samson v. Rhodes*, 8 Sco. 544.

(c) *S. C.* ; *sed quære* ?

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[1] Where no time is fixed for performance, a condition must be performed, either during the life of the party who is to fulfil it, or in reasonable time, according to the circumstances of the case. Thus, where the condition is, that the grantee shall pay a certain sum, he is bound to pay it in reasonable time, because he has the use of the land. But if the grantor is to regain the estate on payment of a certain sum, he has during his life to pay it ; because, until payment, he cannot take possession. And if one devise land to A. "on condition he shall marry B.," the devise takes effect immediately and the devisee has his life time to perform the condition. The first of these rules is applicable where an immediate performance by the grantee is necessary, to effect the evident purpose of the grantor in making the conveyance. Devise of lands to a town for school house "provided it to be built within one hundred rods of the place where the

In equity, however, although unreasonable delay will of itself conclude either party, the mere fact of the time fixed for completion having expired is no defence to a suit for specific performance; except where time has been made of the essence of the contract by express agreement; or \*where, from the circumstances of the case, such must clearly have been the intention of the parties. (d)[1]

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but not in Equity, unless by express agreement or under special circumstances.

[\*209]

For instance, on an agreement, by a tenant at will of a public house, for the sale of the possession, trade, and goodwill, at a fixed sum, and of the stock and furniture at a valuation, possession to be taken and the money paid on a given day, the delay of a single day on the part of the purchaser in having the valuation completed, and in

As where vendor incurs liability by keeping property:

(d) See Sug. 305.

meeting house stands." Held, this was a valid condition subsequent, and the vested estate was forfeited, and passed to the residuary devisee, as a contingent interest, upon non-compliance with the condition in reasonable time. And conveyance on condition the grantee shall discharge a mortgage, on the land, made by the grantor, but not fixing any time for such discharge, Held it must be done in reasonable time. See 14 Mass. Rep. 428; *Finley v. King*, 3 Pet. Rep. 376; *Hamilton v. Elliott*, 5 Serg. & Rawle, 375; *Hayden v. Stoughton*, 5 Pick. 528; 10 Pick. 349; 21 Pick. 215.

[1] The rule seems to be, that a forfeiture shall not bind, in all cases, where the thing may be done after the time, or a compensation made for it, and where the breach resulted from inevitable accident. And chancery will relieve, even in favor of the heir of the party who was to have performed the condition, and after a recovery of the land at law, by the heir from whom it was devised away, on condition. A married woman, having a power to dispose of lands, devised them to her executors, to pay \$500 out of them to her son; provided that if the father did not release certain goods to the executors, the devise of the money should be void, and it should go to the executors. After the death of the testatrix, a release was tendered to the father, which he refused to sign. The son brings a bill in equity, against the executors and the father, and the father answered that he was then ready to release. It was decreed that the \$500 should be paid. So where one devises lands, on condition to pay certain sums, at specified times to his heir, and for non-payment of one of them, the heir enters; chancery will restore the land, on payment of the sum with interest. Even where land is devised on condition of paying a sum of money at a certain time, and upon non-payment, devised over, on the same condition; chancery will relieve. See Hilliard on Real Property, vol. 1, 364; 4 Kent Com. 120, 125; *Wells v. Smith*, 2 Edw. Rep. 75; *City v. Smith*, 3 Gill & Johns. 865; *Baxter v. Lansing*, 7 Paige 350; *Bacon v. Huntington*, 14 Conn. 92; *Lockett v. White*, 10 Gill & Johns. 490.

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taking possession and paying the purchase-money was held to relieve the vendor from the contract; inasmuch as he incurred fresh liabilities by retaining the premises, and the stock in the mean time varied.(e)

or property  
is of fluctu-  
ating value;

So, the fluctuating value of the property may alone show that time was to be of the essence of the contract; as upon an agreement for the sale of foreign stock,(f) or of a reversion, (which may become an estate in possession during the delay, and the sale of which generally evidences immediate want of money,(g) or of a life annuity, or life estate, which may determine by the death of the *cestui que vie*.(h)

or of a de-  
terminable  
character;

or is evi-  
dently  
required at  
once;

or where  
the vendors  
are a fluctu-  
ating body.

So, where the purchaser evidently requires the property for some immediate purpose.(i)

So, where the vendors, (although beneficially interested,) are a fluctuating body, (as in the case of a Dean and Chapter,) where delay may give the purchase-money to persons other than those who signed the contract.(j)

Modern de-  
cisions tend  
to render  
time  
material  
[\*210]

And the tendency of modern decisions has been to hold persons concerned in contracts relating to land, bound, as \*in other contracts, to regard time as material; and this principle has been applied with the greater strictness where the property was connected with trade.(k)

Purchase-  
money being  
required to  
discharge  
incumbran-  
ces, a mate-  
rial fact.

So, the circumstance of the purchase-money being evidently required for payment of incumbrances, is material; especially if the rate of interest which they bear exceed that which the purchaser is to pay during delay.(l)

But private  
unexpressed  
motives for  
purchase  
immaterial.

But the private motives which may have induced a party to enter into a contract, unless expressed in the agreement, or such as might be anticipated from the general apparent circumstances of the case, do not make time essestial; e. g., the unexpressed intention to reside

(e) *Coslake v. Till*, 1 Russ. 376.

(f) *Doloret v. Rothschild*, 1 Sim. & St. 590.

(g) See *Newman v. Rogers*, 4 Bro. C. C. 391.

(h) See *Withy v. Cocli*, Turn. & R. 78.

(i) *Wright v. Howard*, 1 Sim. & St. 190; *Parker v. Frith*, *ib.* 199.

(j) *Carter v. Dean of Ely*, 7 Sim. 211.

(k) *Per Wigram, V. C.*, in *Walker v. Jeffreys*, 1 Ha. 348; and see *Seaton v. Mapp*, 2 Coll. 556.

(l) *Popham v. Eyre*, Loff, 786; Sug. 292.



immediately upon the estate; (m) where, however, the motive is of material importance—as in the case of the intention to reside—although not disclosed in the contract, it would, it appears, be sufficient to bind the vendor to the time named in the contract, if communicated at or within a reasonable period after its execution. (n)

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Effect of, if subsequently communicated.

Nor is a mere undertaking that possession shall be delivered on a certain day, of itself binding in equity. (o)

Undertaking to deliver possession, not binding in equity. But wilful delay concludes in Equity,

In all the above cases the delay may be supposed to have arisen from the state of the title, or otherwise without any wilful or gross neglect by the party in default: gross or wilful neglect, however, by either party, will, in any case, entitle the other party to avoid the contract in equity; *e. g.*, where the vendor, although urged by the purchaser to make out his title, takes no steps to do so, the purchaser immediately upon the expiration of the time fixed for completion may rescind the agreement. (p) [1]

either vendor,

[\*211]

So, a purchaser who takes no steps to enforce the contract within a reasonable time, will be left to his remedies at law; and the tendency of modern decisions is to diminish

or purchaser

Less time now allowed

(m) See *Boehm v. Wood*, 1 Jac. & W. 422.

(n) See 7 Ves. 279; and *Nokes v. Lord Kilmory*, 1 De G. & S. 444.

(o) See *Boehm v. Wood*, 1 Jac. & W. 419.

(p) *Lloyd v. Collett*, 4 Bro. C. C. 469.

[1] In this case the defendant, on the 10th of August 1792, contracted for the purchase of the estate, the purchase to be completed on or before the 25th of March 1793, and had frequently between those times applied for an abstract of the title, but could not obtain one. Shortly after the 25th of March 1793, the purchaser applied for his deposit, with interest from the 10th of August 1792, when he paid it; and afterwards repeatedly applied for it, before the 10th of June 1793, when he brought an action for the deposit. On the 16th of September 1793, an abstract was delivered; the purchaser was then out of town; and on his return, on the 25th of October, wrote, insisting that he would not complete his purchase. On the 6th of November, the bill was filed, by the vendor, for a specific performance, and for an injunction to restrain the proceedings at law. Lord Rosslyn said, the conduct of parties, inevitable accident, &c. might induce the court to relieve; but it was a different thing to say, that the appointment of a day was to have no effect at all, and that it was not in the power of the parties to contract, that if the agreement was not executed at a particular time, the parties should be at liberty to receive it. And he therefore considered the contract as at an end.

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ish the time allowed to either party for enforcing his rights under the contract.(q)

Title at hearing sufficient in equity, where time not essential.

Where time is not of the essence of the contract, and the delay originates in the state of the title, it is sufficient, upon a bill for specific performance being filed by the vendor, if a good title be shown at the date of the decree.(r)

As to the rule as law.

And, at law, where no time is fixed for completion and the purchaser does not require the title to be produced, and none is produced before an action has been commenced by the vendor, it is sufficient if the latter perfect his title at any time before the trial;(s) but, if a title be produced, and prove defective or be not properly verified, and *a fortiori*, if the vendor, on being required to produce a title, altogether neglect to do so, the production of a perfect title before trial is insufficient.(t)

Time not originally essential may be limited by notice.

But although time may not originally have been of the essence of the contract, either party may, by proper notice, bind the other to complete within a reasonable specified period.(u)

which must allow a reasonable period.  
What is a reasonable period.

The notice should, at least as a matter of precaution, be in writing, and should allow a reasonable time for completion; what time can be so considered, must greatly depend upon the circumstances of the particular case; three days' notice by a vendor would be too short;(v) so, a \*week's notice by a purchaser, within which time the vendor was required to prove a disputed legitimacy, was held too short;(w) two months' notice by a purchaser, within which time the vendor was required to remove an objection to the title depending upon a defective execution of a power, appears to have been considered sufficient in a recent case; which was, however, decided upon another point:(x) in another recent case, where a delay of two

[\*212]

(q) *Vide infra*, Ch. XVIII.; 6 Ha. 213.

(r) *Ibid.*

(s) *Thomson v. Miles*, 1 Esp. Ca. 184.

(t) *Vide infra*, Ch. XVII.

(u) *Stewart v. Smith*, 6 Ha. 213, n.

(v) Sug. 306; See *Reynolds v. Nelson*, 6 Mad. 18.

(w) *King v. Wilson*, 6 Beav. 124.

(x) *Southcomb v. Bishop of Exeter*, 11 Jur. 727; 6 Ha. 213.

months had occurred in procuring the execution of the conveyance by certain parties, a ten days' notice by the purchaser was considered sufficient.(y)

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It is not, as a general rule, essential to the binding effect of a vendor's notice, that he should, at the expiration of it, return or tender the deposit;(z) nor, on the other hand, where the purchaser's notice has expired, is he bound to bring an action for his deposit.(a)

Vendor giving notice need not return deposit.  
Purchaser giving notice need not sue for deposit.

But a purchaser cannot determine the contract without due previous notice;(b) although notice even of immediate determination would, it is conceived, be so far material as that it would more strongly impose upon the vendor the necessity of using expedition in proceeding to enforce the contract; and the same principles would, it is conceived, apply to notices by a vendor.

But purchaser cannot determine contract without previous notice.

Where a railway company had power at any time within seven years to take land for the purposes of the undertaking, and agreed to purchase land and to pay interest upon the purchase-money from the day they should commence their works on the land until the purchase money should be paid, it was held that the vendor could not enforce specific performance; the company not having \*commenced their works, and the seven years limited by the act remaining unexpired.(c)

Time for performing contract held to remain at option of purchasers.

[\*213]

And time, although of the essence of the contract by original agreement, or made imperative in equity by subsequent notice, may be enlarged or waived, by subsequent agreement, or the acts of the parties.

Time, although essential, may be enlarged or waived;

Thus, if a purchaser proceed in the purchase after the expiration of the time fixed by the contract,(d) or limited by his notice, it amounts to waiver.(e)

as by proceeding in purchase, after expiration of time;

So, where a purchaser made no demand of the possession of the purchased premises until a quarter before

or by neglect to require possession

(y) *Benson v Lamb*, 9 Beav. 502.

(z) Sug. 303.

(a) *Southcomb v. Bishop of Exeter*, 11 Jur. 727; 6 Ha. 213.

(b) *Taylor v. Brown*, 2 Beav. 181; *Wood v. Machu*, 5 Ha. 158.

(c) *Bodington v. Great Western Railway Company*, 13 Jur. 144.

(d) *Boyes v. Liddell*, 6 Jur. 725.

(e) *King v. Wilson*, 6 Beav. 124; and see *Ex parte Gardner*, 4 Y. & C. 503.

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until the last  
moment.How not en-  
larged at law

twelve at night on the day fixed for completion—part of the property consisting of cottages let to weekly tenants—this was held, at law, to be a waiver of the condition as to time.(f)

But at law, time, is fixed by an instrument under seal; cannot be enlarged by an instrument not under seal;(g) so, if fixed by a written agreement not under seal, it cannot be enlarged by word of mouth.(h)[1]

(f) *Palmer v. Temple*, 1 Per. & Dav. 379; see p. 381; 9 Ad. & El. 508.

(g) *Rippengall v. Lloyd*, 2 Nev. & M. 410.

(h) *Storwell v. Robinson*, 3 Bing. N. C. 928.

[1] In detinue by the mortgagor of a slave, redeemable, by the terms of the deed, at a certain day, the mortgagor was allowed to show a subsequent verbal agreement to extend the period of redemption, and an offer to discharge the mortgage, pursuant to such extension. *Deshazo v. Lewis*, 5 Stew. & Port. 91. Where no place is mentioned for the delivery of the deed, in articles under seal for the sale of land, though the legal effect would be, that the vendor is bound to seek the vendee, and tender the deed, yet the parties may, by parol, agree on a place of performance, after the execution of the articles, or the vendee may appoint a place; and, if the vendor tender at the place, it is well. *Franchot v. Leach*, 5 Cow. Rep. 506; *Wyman v. Winslow*, 2 Fairf. Rep. 506; *Robinson v. Bachelder*, 4 N. H. Rep. 45-6. Various cases recognize the doctrine that a parol enlargement of the time for performing a sealed contract, may avail as an excuse for non-performance at the day. *Neil v. Tilman*, 1 Bail. Rep. 538; *Cox v. Bennett*, 1 Green's Rep. 165. But, where the action is directly upon the specialty, the plaintiff cannot show an extension of time, or other parol variation, by way of maintaining his suit. If this is requisite, the action should be grounded on the subsequent agreement. It is settled, that in these, and the like instances, the specialty may be considered as incorporated with the subsequent verbal agreement, and the whole treated as one entire parol contract, on which assumpsit will lie, and the remedy upon which may be barred after six years by the statute of limitations. In such instances, a parol consent to a waiver or alteration of some portion of the written contract, may frequently be inferred from the acts of the parties; such as their going on, after the day fixed for complete performance, etc. But, in the absence of any express stipulation, it is not to be presumed that they agreed to vary from the terms originally fixed upon, further than their conduct necessarily imports. See *Vicary v. Moore*, 2 Watts' Rep. 451, 456-7; *Merrill v. Ihica and Owego R. R. Co.* 16 Wend. 586; *Mead v. De Golyer*, ib. 632; *Jewell v. Schräppel*, 4 Cow. Rep. 564; *Baird v. Blairgrove*, 1 Wash. Rep. 170; *Langworthy v. Smith*, 2 Wend. 587; *Marks v. Robinson*, 1 Bail. Rep. 89; *Sinard v. Patterson*, 3 Blackf. 353; *Watchman v. Crook*, 5 Gill & John. 239; *Ford v. Campfield*, 6 Halst. Rep. 327; *Luciani v. American Fire Ins. Co.*, 2 Whart. Rep. 167; *Evans v. Thompson*, 5 Easts' Rep. 119.

A conditional written waiver by a purchaser of his previous notice of abandonment, will be construed strictly against the vendor.(i)

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Conditional waiver.

And where the conditions provide for delivery of the abstract at a certain time, the purchaser waives them in equity by receiving the abstract after that time ; or even, it would seem, by perusing it unnecessarily, or retaining it, if delivered under circumstances which prevent its immediate rejection.(j)

Time for delivery of abstract waived in equity by receiving it after time ;

\*And a condition for delivery of the abstract on a certain day, is waived in equity by a purchaser who does not ask for it within a reasonable time before the day fixed for its delivery ;(k) the same rule would, no doubt, apply to the production of evidence, &c. ; and it is conceived that a waiver of time as respects matters, (such as the delivery of the abstract, &c.,) which *must* necessarily precede completion by a considerable period, would, in general, amount to a waiver of the time (if any) fixed for the completion.

[\*214]

or by not asking for it.

Suggested extension of the rule.

So, a stipulation that time shall be of the essence of the contract, is waived by a purchaser who receives, and retains without objection, an abstract upon the face of which it appears that a title cannot be made within the time fixed for completion ;(l) or who, without an objection on that specific ground, proceeds with the purchase under a knowledge that there is no reasonable probability of the title being perfected in time for completion ; as when it depends upon the result of a hostile chancery suit.(m)

Time waived by not objecting to certain or highly probable delay in completion.

It seems doubtful whether a mere protest against the delay will save the benefit of the stipulation ;(n) it is conceived, that until the expiration of the time limited for completion, a purchaser may safely, and is indeed bound to, proceed in the matter so long as a reasonable possibility exists of the title being perfected in time ; taking

Effect of protest in such cases—suggested mode of proceeding.

(i) See *Stewart v. Smith*, 6 Ha. 222, n.

(j) See *Seton v. Slade*, 7 Ves. 278.

(k) *Jones v. Price*, 3 Anst. 924.

(l) See *Hipwell v. Knight*, 1 Y. & C. 401, 419.

(m) *Pinke v. Curteis*, 4 Bro. C. C. 332.

(n) See Sug. 300.

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[\*215]

"Month"  
means  
*prima facie*  
a lunar  
month.

care, nevertheless, to protest in writing against the delay, and to give notice of his intention to insist on his strict rights. So soon as the time has expired, or so soon as it previously becomes certain that the title cannot be perfected in time, he should take no further steps in the matter, but should in writing rescind the contract; and then, if inclined to give the vendor the opportunity of completing \*within a reasonable period, all subsequent communications should be expressed to be without prejudice to the notice of rescinding, and should take the shape of mere negotiations for a fresh agreement.[1]

It may be observed, that even in a contract for or connected with the sale of land, the term *month* means *prima facie* a lunar month; although it may be construed a calendar month, if, from the context, or from the surrounding circumstances at the time of making the contract, such appears to have been the intention of the parties.(o)[2]

(2.) *Objections to title ;—negotiations upon and waiver of ;—when possession taken amounts to waiver.*

Effect of  
negotiations  
upon condi-  
tion as to  
objections.

We have already (*p*) adverted to the effect which negotiations upon the title may have upon the vendor's rights under the ordinary conditions limiting a time for taking

(o) *Lang v. Gale*, 1 Mau. & S. 111; *Simpson v. Margilson*, 11 Q. B. 23; and Sir E. Sugden's remarks, V. and P. 283, on *Hipwell v. Knight*, 1 Y. & C. Ex. 401.

(p) *Supra*, 72.

[1] See *Hepburn v. Dunlop*, 1 Wheat. 179—196; *Hepburn v. Auld*, 5 Cranch, 262; *Ramsay v. Brailsford*, 2 Des. 583.

[2] In England the term month means a lunar month. But in mercantile contracts, the usage or rule is to calculate months as calendar; and in other contracts the lunar is made to yield to the calendar month, if such was the intention of the contract. In this country the term month is usually computed as calendar, especially in statutes and judicial proceedings. The New-York Revised Statutes declare that "whenever the term 'month' or 'months' is or shall be used in any statute, act, deed, verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar, and not a lunar month, unless otherwise expressed." 1 N. Y. R. S. ch. 19, tit. 1, sec. 4. In Georgia, however, the lunar month is intended in statutes, unless otherwise expressed. Dudley's Rep. 107.

objections, and giving him the power to rescind the contract. Chap. 'X.

It may be observed, that a solicitor purchasing from his client, cannot insist upon any objections to the title which he—or his then partner in the case of a firm—considered unimportant when acting for the client upon his original purchase.<sup>(q)</sup>

Solicitor purchasing cannot object to title which he accepted for his client.

Care should be taken not to make frivolous or unnecessary objections or requisitions; objections clearly frivolous, made and persisted in, would certainly indispose, even if they did not prevent,<sup>(r)</sup> a Court of Equity from enforcing the contract at the suit of the purchaser: it perhaps seldom happens, upon the perusal of a long abstract, that either solicitor or counsel confines his requisitions within the strict limits of his client's rights; but it is of importance that no untenable requisition should be persisted in; for instance, where a purchaser had required unnecessary evidence, and had in consequence been refused that to which he was really entitled, he was not allowed his costs, although he obtained a decree for specific performance.<sup>(s)</sup> we may here refer to a modern case, where, when a purchaser from a mortgagee alleged that the latter was unable to deliver possession, and insisted on the concurrence of the mortgagor, although the mortgagee offered to deliver possession, it was held in a suit for specific performance, that the mortgagee was entitled to a decree with costs if *then* able to deliver possession, and the court refused to inquire whether, when his offer to deliver possession was not accepted, he was able to perform it.<sup>(t)</sup>

Danger of frivolous objections and requisitions.

[\*216]

And, on the other hand, a purchaser should be careful not to hold back important objections or requisitions; if he knowingly do so, the question may arise whether he has not impliedly waived them;<sup>(u)</sup>[1] and where a pur-

or of withholding objections, &c., whether it amounts to waiver.

As to costs incurred by

(q) *Bevor v. Simpson*, Taml. 69.

(r) Sug. 291.

(s) *Newall v. Smith*, 1 Jac. & W. 263.

(t) *Allen v. Martin*, 5 Jur. 239, R.

(u) See Sir E. Sugden's remarks on *Magennis v. Fallon*, V. and P. 407.

[1] Where difficulties arise in making out a good title, the purchaser should not take possession of the estate until every obstacle is removed.

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vendor  
before fatal  
objection.

chaser puts a vendor to expenses in complying with requisitions, &c., and then takes and insists upon a fatal objection, which he originally had the means of discovering, it seems probable that if a bill were filed by the vendor for specific performance and dismissal, the court would not dismiss it with costs, without allowing to the vendor, by way of set-off, the expenses so incurred by him; (v) although it does not appear that he could otherwise recover them. (w)

Purchaser's  
*prima facie*  
right to a  
good title.  
[\*217]

We have already considered (x) what expressions will negative the purchaser's *prima facie* right to a marketable title; he will, however, be bound, not only by express stipulation, but also by a clear notice of the state of the title, given to him before entering into the agreement. (y)

May be  
waived.

But a purchaser may, after the contract, either expressly or impliedly, waive, either wholly or in part, his right (whether it be absolute or qualified) to a marketable title, or to the usual evidences thereof.

Purchaser  
not bound  
by his  
counsel's  
opinion,  
unless he  
adopts it.

We have seen that a purchaser is not bound by his counsel's approval of the title; (z)[1] if, however, counsel

(v) See and consider *Deverell v. Lord Bolton*, 18 Ves. 505, 514, 515.

(w) See Sug. 428.

(x) *Supra*, p. 66 *et seq.*

(y) *Ogilvie v. Foljambe*, 3 Mer. 64.

(z) *Deverell v. Lord Bolton*, 18 Ves. 505.

Purchasers frequently take this step under an impression that it gives them an advantage over the vendor; but this is a false notion; such a measure would, in many cases, be deemed an acceptance of the title, or would at least be a ground to leave it to a jury to consider whether the party had not taken possession with an intention to waive all objections. Where a purchaser, after delivery to him of the abstract, which discloses a reservation of right of sporting, not noticed in the particulars by which he purchased, upon his application, was let into possession, and paid the greater part of the purchase money, without objecting to the right reserved, and apologized for not sending the draft of the conveyance, and afterwards raised the objection, he was held bound by his conduct, which was considered as a waiver of the objection; and although a clerk of the seller's solicitor wrote in answer to the purchaser's application for compensation, that a reasonable compensation would be allowed, yet this was not deemed binding, as he had no authority to make such an offer. See 1 Sug. on Vend. p. 8, 9; *Burnell v. Brown*, 1 Jac. & Walk. 168, *cited*.

[1] Lord Eldon determined, that where an abstract is laid before counsel, who approves the title, his approbation is not to be taken as against



waive a requisition or objection, and the purchaser adopt his opinion and deal with the vendor on that view, he cannot afterwards repudiate it.(a) Where a purchaser, having taken several objections, expresses himself willing to accept the title upon a specified objection being removed, this waiver of the other objections is merely conditional upon the removal of the specified objection; so that, if such objection be not removed and a bill be filed against him for specific performance, he is entitled to a general reference as to title.(b) Acceptance of the title, as abstracted, is not a waiver of the purchaser's right to have the abstract verified:(c) nor will the court imply a waiver of any objection which is not clearly raised by the contents of the abstract;(d) nor does a purchaser, by waiving

Effect of acceptance of title subject to specified requisition.

(a) *Alexander v. Crosby*, 1 Jones & Lat. 666.

(b) *Lesturgeon v. Martin*, 3 Myl. & K. 255.

(c) *Southby v. Hutt*, 2 Myl. & Cr. 217.

(d) *Blacklow v. Laws*, 2 Ha. 47.

the person consulting him, as a waiver of all reasonable objections; the court cannot compel a specific performance upon the ground of an opinion which it may think wrong. The purchaser may either take an opinion from some other counsel, or the one first consulted, may correct his error in a further opinion. This, says Sugden, was always the understanding of the profession. Sug. on Vend. vol. 2, p. 11. And although a purchaser's solicitor state that all the objections to the title are removed save one, and make such a statement in a case submitted to counsel, yet if the seller file a bill, the purchaser will be entitled to a general reference as to title. The purchaser, by his contract, was not bound to complete his purchase, without a full and marketable title, and he had not done any act to the prejudice of the seller, either with respect to the possession of the property, or otherwise; which could affect his right to such marketable title. As to the waiver, the effect of the correspondence between the solicitors, and the statement in the case for the opinion of counsel, amounted to no more than this, that according to the advice which he had received, he was then willing to complete his contract, provided the objection was removed. The objection, however, was never removed, and the voluntary assurance given at that particular time, would not create a legal obligation upon him to relinquish in all future proceedings his original right to a marketable title. It might turn out, upon inquiry before the master, that he had been ill advised as to the effect of some of the objections originally taken to the abstract; or it might turn out that there was matter destructive of the title of the seller, which did not appear upon the abstract.

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Waiver may  
be implied

from apolo-  
gies in letter  
for non pay-  
ment of pur-  
chase  
money.

[\*218]

his right to an abstract, necessarily waive objections to the title which are otherwise known to him.(c)[2]

And waiver need not be express; it may be implied, either from letters or mere acts of the party.

For instance, where a purchaser who had been let into possession—but which, as it was according to the contract, \*does not appear to be very material—and who had retained the abstract for a considerable period without objection, and had altered and let the premises, wrote a letter to his solicitor for the purpose of its being communicated to the vendor, and therein expressed his “vexation at the delay which had happened about payment,” and his gratification “at the liberality and patience shown” to him, this was held to amount to an admission that the

(c) *Sidebotham v. Barrington*, 3 Jur. 947.

[2] The acceptance of an abstract as satisfactory, only waives the objections in the abstract; and if, in such a case, the purchaser can prove the title bad, of course the contract could not be enforced. And, of course, a man may have accepted the title as it appears upon the abstract, and yet not have waived his right to have it proved as stated. Statements in the abstract that the seller has in his possession or power certain of the deeds, or has them not in his possession, will bind the purchaser, if he proceed with the treaty without objecting on this head, not to object that those deeds are not delivered up to him on the completion of the purchase; but they do not inform him that the vendor is unable to give any proof of the existence or contents of the documents set out in the abstract. And where an action was brought by a purchaser to recover his deposit for a misdescription of the restrictions in the lease by which the property was held; an abstract had been delivered with a general statement of the restrictions, which did not give full information; objections were taken to the title which were of no weight, or were answered, but the purchaser never required to see the lease. Upon the trial the objection was taken by the purchaser when the lease was produced. It was insisted that he had, by his conduct, waived the objection. The court decided that there was no waiver, but the purchaser stood at the trial, as he might do, upon his legal right. *Sug. on Vend.*, vol. 2, p. 12 and 13. And where a purchaser took counsel's opinion upon the abstract, who approved of the title, subject to some matters which were cleared up, and three months after objected to the contract on the ground that what was called a ground rent in the particulars, was a rack rent. Lord Eldon said, that although the particulars of the rent reserved, appeared upon the abstract, he did not think it necessary, because the opinion of a conveyance had been had to force the party to take a subject essentially different from that which he contracted to purchase, and on which alone that opinion was called for. *Ib.* 15.

title was approved : (f) and the same decision was come to in a later case, where a purchaser took possession under the contract, paid part and gave security for the residue of the purchase-money, and mortgaged her interest under the contract. (g)

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From payment for, and dealing with property.

The preparation of the conveyance, cannot, in general, be much relied on as evidence of waiver ; (h) [1] where, however, in the case of a lease, the lessee, without previously requiring a title to be shown, approved of a draft lease furnished by the lessor, and took possession under the contract, he was held to have waived all objections to the title : (i) so, where a purchaser of a leasehold house, after transmission to him of the original lease, prepared a draft assignment, and made various objections as to repairs and other matters, but did not require the production of the lessor's title, the court seems to have considered that he had waived its production. (j)

Preparation or approval of conveyance, when a waiver.

An attempted resale of the property, is, in general, immaterial ; except that the actual or attempted resale of merely a *portion* of the estate, may, as between the original vendor and purchaser, show that the latter did not consider such portion material to the enjoyment of the residue. (k) [2]

Attempt to resell, no waiver :—to resell part effect of.

(f) *Margravine of Anspach v. Noel*, 1 Madd. 310.

(g) *Haydon v. Bell*, 1 Beav. 337.

(h) See Sug. 402.

(i) *Warren v. Richardson*, You, 1.

(j) *Clive v. Beaumont*, 1 De G. & S. 397 ; *Smith v. Capron*, 7 Ha. 191.

(k) See 1 Madd. 170.

[1] The preparation of a conveyance may be an important fact, as amounting to evidence that the parties had arrived at a stage of proceeding subsequent to the question of title, and may be supposed, therefore, to have removed or abandoned all objections. But this is only a circumstance which, standing by itself, is not very important ; for in many cases the conveyance is prepared upon the belief that the title will be cleared up.

[2] According to Sugden, "attempting to re-sell the estate is an important circumstance upon the question of waiver, but that like all other acts, may be explained ; it may have taken place before any opinion was taken upon the title, although the objection was known ; or it may have been made in order to ascertain the value, without intending to sell the property ; or it may be upon the presumption that a good title will be made. An actual re-sale, indeed, as far as mere title is concerned, can

## Chap. X.

Possession,  
how far to  
be relied on  
as evidence  
of waiver.

Forcible  
possession a  
waiver.

\*Possession of the property by the purchaser is the fact most frequently relied on as furnishing evidence of waiver of objections to the title; its importance, however, depends upon the circumstances attending its acquisition and retention.

The strongest case against the purchaser, is, where he forcibly, or without the consent of the vendor, takes possession: forcibly taking possession, was held in an early case to amount to a waiver of an objection for want of title to an important part of the estate. (1)[1]

(1) *Calcraft v. Roebuck*, 1 Ves. jun. 221.

seldom be deemed an acceptance of it, because, unless the first purchaser has bound the second, to take the title as it stands, the former must intend to obtain a good title himself, in order to confer it on the latter. Where a title cannot be made to a portion of the estate, and the purchaser attempts to re-sell that portion, that unexplained, or an actual re-sale would show that he did not consider that portion (however, in fact, complicated with the estate) as material to the enjoyment of the bulk of the property, and therefore it would be so far a waiver that he would be compelled to complete his purchase, with a compensation for the portion so offered to sale or sold." Sug. on Vend. vol. 2, p. 11.

[1] In the case here cited, although the court thought they could have held the conduct of the purchaser, in taking forcible possession of the estate, with full knowledge of the want of title to a part of it as amounting to a waiver of all objection if the matter had totally ended there, yet held that the waiver was restricted so far, that although he was compelled to complete the purchase, he was entitled to a compensation for the part to which a title could not be made. This was in consequence of what passed subsequently to his taking possession, for the court could not infer from his conduct, though he took possession with violence, that he in his own mind, did agree to quit his hold upon the demand, nor that the seller understood him to do so, for the latter treated with him for a compromise, subsequent to the taking possession; therefore, if he fixed him with the possession, it was more in the nature of a penalty, which was an impossible ground for this purpose. This is an instance where possession improperly taken, is yet, by the acts of the parties, prevented from operating altogether as a waiver. So where the possession is properly obtained, but the acts would, of themselves, amount to a waiver they may be so qualified, by the purchaser as to render them inoperative. As where a purchaser, being in possession, and knowing the infirmity of the title, did several acts, from which it might be inferred that he did not consider a small portion of the estate, to which a title could not be made, important to the enjoyment of the estate itself, or the title to it of consequence, yet, they were not held to be conclusive circumstances, because he was constantly asking for the title to this part of the property, and never appeared to have lost sight of a good title, but from first to last, insisted

Possession, however, if taken in accordance with the clear intention of the parties as evidenced by the terms and subject-matter of the contract,<sup>(m)</sup> or with the consent of the vendor,<sup>(n)</sup> is not in itself, as a general rule, any waiver of the purchaser's right to a good title, or of any pending negotiations upon the title: where, however, the purchaser was, upon his own application, let into possession, this was held to be a waiver of an objection (viz., a right of sporting over the property) which appeared upon the face of the abstract delivered three months previously, but had not been made the subject of remark by the purchaser or his solicitor:<sup>(o)</sup> it is material here to observe, first, that the purchaser's general requisitions upon the title appear<sup>(p)</sup> to have been made prior to the application for possession; and secondly, that the objection was of a permanent character, and not probably capable of removal; the case may, perhaps, be held to show, that the acceptance of possession amounts to an implied waiver of any known objection, which the purchaser knows, or may reasonably believe, cannot be removed; or has not formed \*part of his previous requisitions upon the title, (supposing any requisitions to have been already made.)

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Possession taken under contract, or with vendor's leave, no waiver;

except under special circumstances;

but may amount to waiver of objections, which are irremovable, or have not been included in previous requisitions.

[\*220]

The grant of a lease by the purchaser to a tenant in possession is equivalent to taking possession.<sup>(q)</sup>

Granting lease equivalent to possession.

(3.) *As to the general rights and liabilities of a purchaser in possession.*

It appears to be clear that a purchaser, when in the Purchaser

(m) *Stevens v. Guppy*, 3 Russ. 171.

(n) *Burroughs v. Oakley*, 3 Sw. 59.

(o) *Burnell v. Brown*, 1 Jac. & W. 168.

(p) See 1 Jac. & W. 171.

(q) *Ex parte Sidebotham*, 1 Mont. & Ayr. 655.

on it. And the title was not incurable, but might have been rendered good, if certain inquiries were satisfactorily answered; it was not absolutely, but contingently bad. The court observed that a man, by going on to treat, does not waive an objection he is constantly insisting on. If nothing had been said of this part, after the title to it, had been found defective, the objection might have been considered as waived, but here he is perpetually desiring to have a good title. A treaty cannot waive that which he treats about. See Sug. on Ven. vol. 2, p. 13 and 14.

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in possession  
may gene-  
rally act as  
owner,  
without  
thereby  
waiving  
title.

As by  
altering  
property.

Whether  
universally  
so.

authorized possession of the estate, may, to a certain extent, act as owner without thereby accepting the title; he may take a fall of underwood in due course;(r) so, in the case of a timber estate, a fall of timber would, it is conceived, be no necessary acceptance of the title, although it might be restrained at the suit of the vendor upon the ground of its diminishing his security for the purchase money;(s) nor does it appear that any act of management of the estate in a due course of husbandry, or in a fair exercise of the supposed right of ownership,(t) would be of importance; thus it has been held by V. C. K. Bruce that, upon a purchase of four acres of land, stubbing up an osier bed of nine perches, levelling the land, and filling up a pond, did not amount to a waiver of title.(u)

In fact, Sir E. Sugden states without qualification,(v) that "acts of ownership after an authorized possession are of no importance;" the reported cases, however, scarcely seem to support so wide a proposition; and it is, perhaps, hardly maintainable upon principle:(w)[1] if the

(r) 3 Sw. 170.

(s) *Supra*, p. 118.

(t) 1 You. 506.

(u) *Osborne v. Harvey*, 1 Y. & C. C. C. 116.

(v) V. and P. 401.

(w) See *Donovan v. Fricker*, Jac. 165; *infra*, p. 223.

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[1] Upon an express waiver, little difficulty is likely to arise, but, in most cases, the waiver is not express, but implied from the conduct of the purchaser. A purchaser, by entering into possession is generally held, by that act, to have waived the objections to title; for where a purchaser knowing of an objection to a title, enters into possession of the estate, he may be considered to have himself executed the purchase. The question, in each case, is one of fact: did the purchaser mean to waive, and has he actually waived, his right of examining the title? although his *intention* will be inferred from his acts, and no direct expression of it is required. His silence, as we shall see, may be tantamount to the clearest expression of being content with the title. Attempting to re-sell the estate is an important circumstance upon this question of waiver, but that, like all other acts, may be explained; it may have taken place before any opinion was taken on the title, although the objection was known; or it may have been made in order to ascertain the value, without intending to sell the property; or it may be upon the presumption that a good title will be made. An actual release, indeed, as far as mere title is concerned, can seldom be deemed an acceptance of it, because unless the first purchaser

purchaser of a house and pleasure-ground, let into possession pending the investigation of the title, were to fell all the \*ornamental timber, he might, it is conjectured, find a difficulty in getting rid of his bargain upon the ground of the title being not strictly marketable.

[\*221]

At any rate, it appears that a distinction must be made between important acts of ownership committed previously to, and those committed after, the discovery of a serious objection to the title ;(x) for acts which materially affect the property are justifiable only under the purchaser's belief that he is in fact the owner.

Whether so after discovery of defect in title.

And where a purchaser, who had been long in possession of the property, and had taken frivolous objections to the title, refused to receive any further explanations, and yet retained possession, he was held to have accepted the title.(y)

Retention of possession and refusal to discuss the title, held an acceptance.

And an act which amounts to a waiver of the purchaser's right to reject a defective title, is not necessarily a waiver of his right to compensation for the defect.(z)[1]

Waiver of title not always waiver of compensation.

(x) *Dixon v. Astley*, 1 Mer. 135 ; see 1 You. 507.

(y) See *Hall v. Laver*, 3 Y. & C. 196.

(z) See *Calcraft v. Roebuck*, 1 Ves. jun. 221.

has bound the second to take the title as it stands, the former must intend to obtain a good title himself, in order to confer it on the latter. Where a title cannot be made to a portion of the estate, and the purchaser attempts to re-sell that portion, that unexplained, or an actual re-sale, would show that he did not consider that portion, (however in fact complicated with the estate) as material to the enjoyment of the bulk of the property, and therefore it would be so far a waiver, that he would be compelled to complete his purchase, with a compensation for the portion so offered to sale, or sold. So the preparation of a conveyance may be an important fact, as amounting to evidence that the parties had arrived at a stage of proceeding subsequent to the question of title, and may be supposed, therefore, to have removed, or abandoned, all objections. But this clearly, is only a circumstance from which such an inference *may* be drawn. Standing by itself, it is not very important; for in many cases, the conveyance is prepared, upon the belief that the title will be cleared up. See 2 Sug. on Vend. p. 9, 11.

[1] In the case here cited, where the court thought they could have held the conduct of the purchaser in taking forcible possession of the estate, with full knowledge of the want of title to a part of it, as amounting to a waiver of all objections, if the matter had totally ended there, yet held that the waiver was restricted so far, that although he was compelled to

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Modification  
of waiver by  
constant de-  
mand of title.

Purchaser  
rejecting title  
may be ejected  
without compen-  
sation for mo-  
neys expended.

So, acts by a purchaser in possession, which might otherwise have been considered as a waiver of objections to the title to a portion of the estate, were held to be modified by his continuing to ask for the title.(a)

A purchaser may,(b) and as a matter of prudence should decline to take possession while the title is in dispute, except under a special agreement; for, if he take possession and then reject the title, he may be ejected by the vendor, and cannot at law claim any allowance for improvements or repairs; nor will equity afford him any relief unless there has been fraud on the part of the vendor:(c) upon taking possession, he becomes, in the \*absence of any spe-

[\*222]

(a) See 1 Madd. 170.

(b) *Forteblos v. Shirley*, 2 Sw. 223.

(c) Sug. 1029; *Nicolson v. Wordsworth*, 2 Sw. 365.

complete the purchase, he was entitled to a compensation for the part to which a title could not be made. This was in consequence of what passed subsequently to his taking possession; for, the court could not infer from his conduct, though he took possession with violence, that he, in his own mind, did agree to quit his hold upon this demand, nor that the seller understood him to do so; for the latter treated with him for a compromise subsequent to the taking possession; therefore, if he fixed him with the possession, it was more in the nature of a penalty, which was an impossible ground for this purpose.

This is an instance where possession improperly taken, is yet by the acts of the parties, prevented from operating altogether, as a waiver. So where the possession is properly obtained, but the acts would, of themselves, amount to a waiver, they may be so qualified, by the purchaser, as to render them inoperative. As, where a purchaser being in possession, and knowing the infirmity of the title, did several acts from which it might be inferred that he did not consider a small portion of the estate to which a title could not be made, important to the enjoyment of the estate itself, or the title to it of consequence, yet they were not held to be conclusive circumstances, because he was constantly asking for the title to this part of the property, and never appeared to have lost sight of a good title, but, from first to last, insisted on it. And the title was not incurable, but might have been rendered good, if certain inquiries were satisfactorily answered; it was not absolutely, but contingently bad. A man, by going on to treat, does not waive an objection he is constantly insisting upon. If nothing had been said of this part, after the title to it had been found defective, the objection might have been considered as waived, but here he is perpetually desiring to have a good title. A treaty cannot waive that which he treats about. See 2 Sug. on Vend. p. 13, 14.



cial agreement,(d) tenant at will to the vendor;(e) whose right to recover possession by ejectment will be subject to the 7th section of the 3 and 4 Will. IV. c. 2.(f)[2] When a purchaser in possession under the contract is advised to rescind the contract, and asserts a paramount title to the property, he is not bound to give up possession before asserting such paramount title by making a formal entry.(g)

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If the contract be rescinded in equity, even on the ground of fraud in the purchaser,(h) the court will, in

What allowances made when vendor has to sue in equity

(d) *Saunders v. Musgrave*, 6 B. & C. 524.

(e) *Doe v. Caperton*, 9 Car. & P. 112; *Doe v. Chamberlaine*, 5 Mee. & W. 14.

(f) *Doe v. Rock*, 4 Man. & Gr. 30.

(g) *Southcomb v. Bishop of Exeter*, 6 Ha. 213.

(h) See *Donovan v. Fricker*, Jac. 165.

[2] "Where difficulties arise in making out a good title," says Sugden, "the purchaser should not take possession of the estate, until every obstacle is removed. Purchasers frequently take this step, under an impression that it gives them an advantage over the vendor; but this is a false notion: such a measure would, in many cases, be deemed an acceptance of the title, or would at least be a ground to leave it to a jury to consider whether the party had not taken possession with an intention to waive all objections. Where a purchaser, after delivery to him of the abstract, which disclosed a reservation of a right of sporting not noticed in the particulars by which he purchased, upon his application, was let into possession, and paid the greater part of the purchase-money, without objecting to the right reserved, and apologized for not sending the draft of the conveyance, and afterwards raised the objection, he was held bound by his conduct, which was considered as a waiver of the objection; and, although a clerk of the seller's solicitor wrote, in answer to the purchaser's application for compensation, that a reasonable compensation would be allowed, yet this was not deemed binding, as he had no authority to make such an offer. If, however, the objections to the title be remediable, and the purchaser be desirous to enter on the estate, he may, in most cases, venture to do so, provided the vendor will sign a memorandum importing that the possession taken by the purchaser shall not be deemed a waiver of the objections to the title, or be made a ground for compelling him to pay the purchase-money into court, in case a bill be filed, before the conveyance to him is executed. And a purchaser may, with the concurrence of the vendor, safely take possession of the estate at the time the contract is entered into, as he cannot be held to have waived objections, of which he was not aware; and, if the purchase cannot be completed on account of the objections to the title, he will not be bound to pay any rent for the estate, unless perhaps the occupation of it has been beneficial to him." Sug. on Vend. vol. 1, pp. 8, 9.

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general, direct an allowance to be made to the purchaser for substantial improvements and repairs; (i) this allowance, however, when the sale is set aside at the suit of the purchaser, will not extend to improvements, or even repairs—except such as are essential to the preservation of the property (j)—made subsequently to the discovery of the matter on which he grounds his right to relief, nor to a greater extent than is specifically prayed by the bill. (k)

On the other hand, it has been recently decided, that, where the title proves defective, an action for use and occupation will not lie against the purchaser for the time during which he has been in possession under the contract: (l) but if, after the contract is clearly abandoned, he retain possession, he will be liable in respect of such subsequent occupation: (m) where a purchaser retained possession for eight years, without payment, and refused

\*either to accept the vendor's defective title or to abandon the agreement, and upon a bill being filed by the vendor and the master reporting against the title, still refused to accept it, he was ordered to account for the rents and profits, and to pay the costs of the suit. (n)

Where C., a sub-purchaser from B., entered into possession, and then, pending a suit for specific performance by B. against A. (the original vendor,) was induced by A. to give up possession under a mistake of facts, it was held that, upon a decree being made for specific performance of the contract between A. and B., and a conveyance being executed by A., C. could maintain use and occupation against him, for the time during which he had resumed possession. (o)

Where a contract was rescinded upon the ground of fraud in the purchaser, the latter was compelled to rein-

(i) Sug. 1028.

(j) Sug. 279.

(k) See *Edwards v. M'Leay*, 2 Sw. 232.

(l) *Winterbottom v. Ingham*, 7 Q. B. 611; and see *Hearne v. Tomlin*, 1 Pea. N. P. C. 253; *Kirtland v. Pounsett*, 2 Taunt. 145.

(m) *Howard v. Shaw*, 8 Mee. & W. 118.

(n) *King v. King*, 1 Myl. & K. 442.

(o) *Hull v. Vaughan*, 6 Pri. 157; and see 7 Q. B. 617.

for repairs,  
improvements,  
etc.;

but purchaser  
not liable for  
use and  
occupation,  
if title bad,

until it is  
rejected.

[\*223]

Purchaser  
wrongfully  
induced to  
give up possession  
may maintain use  
and occupation  
where contract is  
completed.

Purchaser  
compelled to  
reinstat premises  
which he had altered.

state a private house which he had converted into a shop : (p) the *fraud* is not noticed by Sir *E. Sugden* in stating the case ; (q) and if, as may therefore be supposed to be his opinion, this was not the ground of the decision, the decision seems to be an authority for this very reasonable proposition, viz. : that alterations by the purchaser, although not in themselves a waiver of title, will yet deprive him of the aid of a court of equity in rescinding the contract, if they are such as change the nature or character of the property, and do not admit of reinstatement.

Whether if reinstatement impossible, purchaser may not be compelled to keep the property.

(4.) *Vendor in possession, by altering property avoids the contract.*

And, on the other hand, any alteration of the subject-matter of the contract by the vendor, in any particular \*which does not admit of compensation or reinstatement, as the fall of ornamental timber, (r) will entitle the purchaser to abandon the contract. [1]

[\*224]

Material alteration of property by vendor may avoid contract ;  
e. g. fall of ornamental timber.

(p) *Donovan v. Fricker*, Jac. 165.

(q) *Sug. 279.*

(r) *Maggennis v. Fallon*, 2 Moll. 588.

[1] It is plain that if the injury to the lands sold be so great as to render them unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether.

In the case cited in the text, it seems to have been decided that if a purchaser having two grounds to be discharged, e. g., a bad title and the felling of ornamental timber, by the seller after the sale, elects to go upon the objection to title, it does not amount to an abandonment of the other objection. It cannot be said, the court observed, that when one contests the right to be held to his purchase, that he waives one ground whilst he continues to insist upon another. Perhaps he was not aware of the equitable principle that an alteration in the thing sold, in particular cases, will entitle the purchaser to be discharged. Even if he was conversant with the doctrine of the court, he might also be aware that it had exercised its authority over purchasers sometimes in an arbitrary and undefined manner. He might think that the court would compel him, upon compensation, to complete the contract, and thinking that no compensation would meet the precise case, endeavor, upon the other ground, to rid himself of it altogether. On that ground he had failed, for a good title was shown, but it was still open to him to resort to the objection for waste done. *Sugden* suggests that it might not be safe for the purchaser to act upon this precedent. See 2 *Sug. on Vend.* 15.

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And in a case between vendor and purchaser, the court, it is conceived, would consider whether the timber destroyed were in fact, or might reasonably be considered, ornamental; and would not—as in cases between tenant for life and remainderman—only regard as ornamental, timber which was planted or left for ornament.(s)

Alterations  
in value of  
estate, or fail-  
ure of consid-  
eration.

We(t) have already considered the relative rights of the vendor and purchaser in the several events of the estate increasing or diminishing in value, or of the failure of the consideration for, or subject-matter of, the contract, before conveyance.

(5.) *As to entry and possession by Railway Companies before completion.*

As to entry  
upon, and  
taking pos-  
session of,  
lands by rail-  
way compa-  
nies, &c. be-  
fore comple-  
tion of pur-  
chase.

[\*225]

By the clauses of the Lands Clauses Consolidation Act, 1845, which relate to the entry upon lands by the promoters of the undertaking,(u) it is, in effect, provided that the promoters shall not, without the consent of the owners and occupiers, enter(v) upon any land, (except for the purpose of making surveys and other similar purposes specified in the act,) until they have paid or deposited the purchase-money or compensation for the same: if, however, before the amount of purchase-money or compensation has been determined by agreement, award, \*or a verdict, they are desirous of entering, they are enabled to do so, upon making such deposit and giving such bond by way of security as are specified in the 85th section of the act: this security must be for the value of *all* the land comprised in the notice of purchase given by the promoters under the 18th section, although the proposed entry be upon only a part of such land;(w) no prior notice

(s) See 2 Moll. 588.

(t) *Supra*, p. 116 *et seq.*

(u) Sect. 84 to 92.

(v) This extends to a subterraneous entry; see *Ramsden v. Manchester Railway Company*, 5 Rail. Ca. 552; in a late case the court refused an injunction, when the entry had been merely for surveying and setting out the line, and the company were no longer in possession: *Fooks v. Wilks, Somerset, and Weymouth Railway Company*, 5 Ha. 199.

(w) *Barker v. North Staffordshire Railway Company*, 2 De G. & S. 55; and as to the form of the bond, see *S. C.* and *Poynder v. Great Northern*

to the landowner of the intention of the promoters appears to be necessary : (x) the deposit is to remain as a security for the performance of the bond, and is to be applied under the direction of the Court of Chancery ; (y) and it will not be paid to the company without notice to the landowner, although the purchase may have been completed by agreement, and the purchase-money paid ; (z) he does not, however, seem to have any lien upon it for his costs payable by the promoters. (a) Any wilful entry by the promoters, without consent and before payment or deposit, is made the subject of a 10*l.* penalty : and the retention of possession after conviction in such penalty renders them liable to a penalty of 25*l. per diem* : (b) but the penalties are not incurred by \*an entry after payment or deposit made to or in favor of parties who were believed to be but were not actually entitled : (c) in case of an unlawful refusal by the landowners or occupiers to give up possession or permit an entry, the promoters of the undertaking can claim the assistance of the sheriff : (d) and a landowner who has by his silence and conduct encouraged a company to carry on their works, upon the supposition that they were entitled to enter and take the land in question, and who subsequently disputes the terms of the contract,

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*Railway Company*, 2 Ph. 330 ; *Langham v. Same Company*, 1 De G. & S. 486 ; and *Hosking v. Philipps*, 5 Rail. Ca. 560 ; 3 Exch. 168 ; and, generally on the construction of the 85th section, *Wiley v. South Eastern Railway Company*, 6 Rail. Ca. 100. In *Rankin v. East and West India Docks Company*, 14 Jur. 7, Lord Langdale, upon the application of mortgagees, restrained the Company from prosecuting their works until they had paid or tendered to the mortgagees the compensation required by the act, (see s. 114 :) but held that he had no jurisdiction to restrain the Company from keeping possession of the premises.

(x) *Bridges v. Writts, Somerset, and Weymouth Railway Company*, 11 Jur. 315.

(y) Sect. 87.

(z) *Ex parte South Wales Railway Company*, 6 Rail. Ca. 151.

(a) *Ex parte Stevens*, 2 Ph. 772.

(b) Sect. 89 ; see *Hutchinson v. Manchester Railway Company*, 15 Mee. & W. 314 ; and *Hutchinson v. East Lancashire Railway Company*, 3 Rail. Ca. 748.

(c) See last note.

(d) Sect. 91.

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is not entitled to an interlocutory injunction to restrain them from so entering.(e)[1]

It has been recently held that the 68th section of the Lands Clauses Consolidation Act applies to the case of land of which the company is in possession under the 85th section.(f)

(e) *Greenhalgh v. Manchester and Birmingham Railway Company*, 3 Myl. & Cr. 784.

(f) *Adams v. Blackwall Railway Company*, 2 Mac. & G. 118.

[1] It seems to be settled in this country, that the State Legislatures have power to authorize rail road companies to enter upon and appropriate private property in land for the use of the road so far as it becomes indispensably necessary for the purpose of the road; *provided*, provision be made in the act, for the assessment and payment, to the owner, of the damages incurred. If the provision is made, it is held to be sufficient, and the damages need not be actually ascertained and paid, previous to the entry and appropriation of the property. See *Bloodgood v. M. & K. R. R. Co.*, 14 Wend. Rep. 51; *S. C.* 18 Wend. 1, 59; *Fletcher v. A. & S. R. R.*, 25 Wend. 462, 464. It rests with the legislature to judge of the cases which require the operation of the right of eminent domain, and it may be applied to the case of roads, turnpikes, railways, canals, ferries, bridges, &c., provided there be, in the assumption of the property, evident utility and reasonable accommodation, as respects the public. See note to 2 Kent's Com. 340; 18 Wend. 14; *Harding v. Goodlett*, 3 Yerg. 41; *Dyer v. The Tuscaloosa Bridge Co.*, 2 Porter's Rep. 296; *Cottrill v. Myrick*, 3 Fairf. 222; *Com. v. Breed*, 4 Pick. 460, 463; 23 Pick. 394-5, 3 Paige Rep. 73; *Harvey v. Thomas* 10 Watt's Rep. 63. The Court of Appeals of Kentucky in the case of *Applegate et als. v. Lexington & Ohio R. R. Co.*, 8 Dana's Rep. 289, held that the legislature could constitutionally exert her eminent domain, in taking private property for public use, through the instrumentality of a rail road company—that private corporations, establishing turnpikes and rail roads, may, in this respect, be deemed public agents, and may take private property for public uses, on making just compensation. In the case of *Taylor v. Porter*, 4 Hill's Rep. 140, it was held that private property could not be taken, nor a private road established for private use, not even by a legislative act, without the consent of the owner, and that any statute doing it was unconstitutional; that it could only be taken by statute for public uses, and not even then without just compensation to the owner. Ch. J. Nelson dissented, on the ground that the laying out private roads over the lands of others, to accommodate one or more individuals, and without the consent of the owner, was within the right of eminent domain, and justified by that principle, and by immemorial usage. Kent (Note to 4 Kent. Com. 340) "apprehends, that the decision of the court was founded on just principles, and that taking private property, for private uses, without the consent of the owner, is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine, in the English and American law."

\*CHAPTER XI.

AS TO SEARCHES FOR AND INQUIRIES RESPECTING INCUMBRANCES.

1. *What inquiries should be made of vendor's solicitors ; and of supposed incumbrancers, trustees, and tenants.*
2. *What searches should be made for incumbrances,—law respecting judgments, &c.*
3. *Time for making searches and inquiries.*

(1.) It appears to be a desirable, although it is not, perhaps, a very usual course, to inquire of the vendor's solicitors, (as part of the general requisitions on the title,) whether they are aware of any judgment or other incumbrance affecting the property, or other matter not noticed in the abstract and affecting the vendor's ability to make a marketable title : (a) such an inquiry may often save much useless expense, and a favorable reply not only adds to the security which the purchaser will derive from the searches of his own professional advisers, but will also remove any doubt as to his right to be paid for the preparation of the conveyance, if such searches disclose incumbrances which cannot be got in : the inquiry should specify any matter the existence of which is specially apprehended ; and when there is reason to suspect the existence of any particular incumbrances, an application should be made to the supposed incumbrancers ; the motive \*for the application should, of course, be stated, and the parties applied to will be bound by their replies ; (b) it does not, however, appear that an incumbrancer need answer any inquiry respecting the particulars of his security, unless the applicant is entitled and offers to redeem him. (c)

Inquiry as to incumbrances, should be made of vendor's solicitors ;

and of supposed incumbrancers.

[\*228]

And an incumbrancer, it is said, need not voluntarily

Whether incumbrancer

(a) It may also be expedient to inquire whether the property is held under the title abstracted, and under no other title : see Mr. Christie's evidence before the Registration Commissioners ; 1st Report.

(b) *Ibbotson v. Rhodes*, 2 Verm. 554 ; *vide supra*, p. 42.

(c) See *Bugden v. Bignold*, 2 Y. & C. C. C. 390.

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need communicate his claim to intended purchaser.

communicate the existence of his claim to a person whom he knows to be about purchasing the estate ;(d) this, however, it is conceived, only holds good in cases where there is no reason to suppose that the vendor is about to commit the fraud of selling the estate as unincumbered ; if, with knowledge of such a fraud being in progress, the incumbrancer were to conceal his claim, equity, it appears, would interfere to prevent his setting up his right against the purchaser ; and infancy, or coverture, would be no excuse :(e) *a fortiori*, would he be postponed in equity, if a party to the fraud, or facilitating or encouraging its commission ;(f) and, inasmuch as no prudent person buys an equity of redemption without communicating with a known incumbrancer, it may be conjectured, that if a mortgagee, being aware that the purchase was about to be concluded on a certain day, and having received no inquiry from the purchaser on the subject of the charge, were to allow him to complete in ignorance of its existence, the courts would be disposed, on slight additional grounds, to treat such an incumbrancer as an accomplice of the vendor.[1]

(d) *Osborn v. Lea*, 9 Mod. 96 ; see p. 97.

(e) *Savage v. Foster*, 9 Mod. 36 ; *Clare v. Earl of Bedford*, 13 Vin. Abr. 536.

(f) *Berrisford v. Milward*, 2 Atk. 49.

[1] If A. sells, or conveys his lands or slaves, to B., and then produces to another his previous title, and obtains credit on the goods or lands, by pledging them for money loaned, he is guilty of fraud ; and if the true owner stands by, and does not make his title known, he will be bound to make good the contract ; on the principle that he who holds his peace, when he ought to have spoken, shall not be heard now that he should be heard. He is deemed in equity a party to the fraud. *The Bank of the United States v. Lee*, 13 Peter's Rep. 107. So where a person intending to buy an estate, inquires of another whether he has any incumbrance on the estate, and states his intention to buy it, if the person of whom the inquiry is made, deny the fact, equity will relieve the purchaser against the incumbrance. And where a purchaser of an equitable right inquires of the trustee of the legal estate, whether he knows of any incumbrance, and he answers in the negative, if it turn out that he had notice of any charge, he will be answerable to the purchaser, although he plead forgetfulness in excuse. *Burrows v. Locke*, 10 Ves. jun. Where an incumbrancer stood by, at a treaty for the settlement of the encumbered estate, on the marriage by the owner's son, without opposition, and fraudulently con-



If the interest about to be purchased be merely equitable, inquiry as to incumbrances should, (as a matter of prudence,) be made of the trustees or other parties in whom the legal estate is vested, and notice given to them \*of completion: it does not, however, appear that a purchaser's rights, (in the case of equitable estates in land,) are affected by his omitting to make such inquiry, or give such notice ;(g) and the inquiry, if unnecessary, need not, it is conceived, be answered; trustees are often unwilling to answer such questions, on account of a case(h) where a trustee, who (through forgetfulness as he subsequently alleged) denied the existence of a charge of which he had notice, was held liable to the purchaser; it appears, however, that he told the purchaser "positively and distinctly"(i) that the vendor was absolutely entitled, that he had "an undoubted right" to assign the property ;(k) and, probably, a less positive reply, one for instance, merely denying the present recollection of any notice, would not involve a trustee in similar liability.

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Inquiry should be made of trustees;

[\*229]

but does not give priority in cases of real estate.

Liability of trustee giving wrong information.

And as notice of a tenancy is notice of the tenant's equities(l) it is a proper precaution, where the property is not in hand, to inquire of the occupying tenants as to the extent and nature of their interests ;(m) it appears, however, that notice of a tenancy is not necessarily notice of the tenant's equities as between vendor and purchaser ;(n) nor is the doctrine above referred to likely to be extend-

Inquiry of tenants.

(g) *Jones v. Jones*, 8 Sim. 633; *Wiltshire v. Rabbits*, 14 Sim. 76; *Wilmot v. Pike*, 5 Ha. 14.

(h) *Burrowes v. Lock*, 10 Ves. 470.

(i) *Ibid.* p. 476.

(k) *Ibid.* p. 475.

(l) *Daniels v. Davidson*, 16 Ves. 249.

(m) 1 Jarm. Conv. by S. 119.

(n) *Nelthorpe v. Holgate*, 1 Coll. 203.

cealed his charge, and privately assured the father of the son that he would trust to his personal security, he was compelled to relinquish it, as against the son and his wife, and the issue of the marriage. 2 Atk. Rep. 49. And the same rule prevails, even where the representation is made through a mistake, if the person making it, have had notice of his right. *Pearson v. Morgan*, 2 Bro. C. C. 388; see also *Teasdale v. Teasdale*, Sel. Ch. Ca. 59.

Chap. XI. ed ;(o) nor need inquiries be made of a person who has recently held but has relinquished possession.(p)[1]

(2.) *What searches should be made for incumbrances :—  
Law respecting judgments, &c.*

Liability of  
solicitor  
omitting to  
search for  
incum-  
brances, &c.  
[\*230]

A solicitor is said to be liable to his client for any loss which may be occasioned by his omission to make any one \*of the numerous searches which may by possibility disclose matter affecting the title ;(q) unless, however, special circumstances render such a course expedient, it is not usual for conveyancing counsel to direct a search for more than judgments, crown debts and accountantships, and *lis pendens*, and also a general search in the County Register (if any,) and in the Manorial Court Rolls, (if the property is copyhold ;) and it may be doubted whether a solicitor would be liable for an omission which is sanctioned by general practice : at any rate, it is conceived, that where the title is laid before counsel, who advises a search for certain specified incumbrances, the

(o) 1 Ha. 62 ; but see *Penny v. Watts*, 1 Mac. & G. 150.

(p) *Miles v. Langley*, 1 Russ. & M. 39.

(q) 1 Jarm. Conv. 104.

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[1] Notice that part of the estate was in possession of a tenant has been held to be notice of a lease, although the purchaser took it for granted that the tenant was only so, from year to year. And if the tenant has changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser ; and consequently, a subsequent purchaser, although without actual notice, will be considered as a purchaser of the seller's title, subject to the equity of the tenant the first purchaser, to have the estate conveyed to him, at the price which he had stipulated to pay to the seller. In such a case therefore, specific performance will be decreed in favor of the tenant, against the seller and the second purchaser ; and they will be left to settle their rights between themselves. It seems that a purchaser cannot be advised to complete a contract for an estate, not in the seller's own occupation, without a communication with the tenants, in order to ascertain what their interests really are. So where a tenant had an interest under an agreement, posterior to the lease under which he held, the purchaser was held to be bound by it, although he had not notice of it. See Sug. on Ven. vol. 3, p. 330, 331, and authorities ; *Chesterman v. Gardner*, 5 Johns. Ch. Rep. 29.

solicitor need not make a more extensive search unless aware of some particular reason for so doing.[1] Chap. XI.

Of these searches, the most generally important is that for judgments; to understand the necessity for which, it will be necessary to consider briefly the old law, as it existed prior to the 1 & 2 Vict. c. 110, and the alterations which have been introduced by that statute. As to searching for judgments—general law respecting.

And here it may be proper to observe, that as against purchasers or mortgagees who advance their money without notice of subsisting judgments, the 1 & 2 Vict. c. 110, is rendered a dead letter by the subsequent Act of 2 & 3 Vict. c. 11, (except, perhaps, as respects judgments in the Palatinate Courts:) so that, as respects such purchasers and mortgagees, the law as it existed before the passing of the former Act, is, with the above exception, alone important; nor does registration under that Act amount to notice: (r) at the same time it is inexpedient to rely upon any presumed want of notice, (s) (especially where the same solicitor acts for both parties;) and the propriety of a search by an intended purchaser or mortgagee, \*may, practically, be considered chiefly with reference to the extended effect of judgments under the new law. As respects purchasers, &c., without notice, law remains as before 1 & 2 Vict. c. 110.

Upon an *elegit*, under the old law, the judgment creditor might take in execution a moiety, (or under two judgments of the same term an entirety,) of the following property of his debtor; (t) viz., freeholds, land held in ancient demesne, rent-charges, estates granted by the Crown for the maintenance of dignities, impropriate tithes, and But want of notice cannot be relied on in practice.

(r) See and consider 2 & 3 Vict. c. 11, s. 5.

(s) For this, among other reasons, viz.: that if judgments exist, and are discovered by a sub-purchaser upon a re-sale, it may be impossible to satisfy him of the original want of notice.

(t) *Prid.* on J. 7, 8, 9.

[1] As to responsibility of attorneys, see *Huntington v. Rumlall*, 3 Day, Rep. 390; *Smede's exrs. v. Elmendorf*, 3 Johns. Rep. 185; *Dearborn v. Dearborn*, 15 Mass. Rep. 316; *Rootes v. Stone*, 2 Leigh, 650; *Scott's admrs. v. Wickliffe*, 1 B. Mon. Rep. 353; *Evans v. Watrous*, 2 Porter's Rep. 205; *Wheeler et al. v. Bullard*, 6 Porter's Rep. 353; *Kerr and wife v. Bank of Chillicothe*, Wright's Ohio Rep. 737; *Wakeman v. Hazleton*, 3 Barb. Ch. Rep. 148; *Shelton v. Tiffin*, 6 How. Rep. 163, 186. See also American Chancery Digest, by Waterman, vol. 1, p. 202. Judgments under old law, what they affected.

Chap. XI. terms of years, including, (probably,) leases of copyholds granted by license of the lord, or, (it is conceived,) under a special custom ; and this, whether the same respectively were held in severalty, coparcenery, or in common.

The right affected reversions, estates held by a husband during coverture or by the curtesy, estates tail during the life of tenant in tail, and estates held in joint-tenancy during the life of the joint-tenant.

And, as to terms of years, either the moiety might be extended upon a single writ, or the entirety might be sold as part of the debtor's chattels.

And, under the Statute of Frauds, the legal rights of the creditor were extended to estates of which a trustee was *seised* simply in trust for the debtor at the time of execution sued ; (u) this provision, it will be observed, does not affect trusts of terms for years, nor has it been held to affect equities of redemption, or any equitable estate in which the debtor has not the sole beneficial interest. (v)

What they  
did not  
affect.

But advowsons in gross, glebe, rents-seck, and copyholds (except as respects leases thereof) are not extendible under the old law ; nor are the lands of a tenant in tail, or joint-tenant, so extendible, except for his life. (w)

And it seems doubtful whether the exemption of copyholds extended to customary freeholds. (x)

[\*232]

\*Nor, as against purchasers, (y) was a term for years bound, until the writ was delivered to the sheriff. (z)

Docketing  
was neces-  
sary as  
against pur-  
chasers.

And in order that a judgment may be binding as against purchasers or mortgagees, it had to be docketed under the Act of William and Mary ; and, (if intended to affect land in a Register County,) entered in the local register. (a)

But pur-  
chaser was

The omission to docket or register, was, however, im-

(u) *Ibid.* 15.

(v) *Ibid.* 18.

(w) *Ibid.* 8.

(x) See *Scriv. on Copyholds*, 570.

(y) *Sed aliter*, as against the debtor's personal representatives ; *Ranken v. Harwood*, 5 Ha. 215.

(z) *Prid. on J.* 13.

(a) *Ibid.* 47, 49.

material in equity, if a purchaser or mortgagee advanced his money with actual notice, (either to himself or his agent,) of the judgment.(b)

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bound in Equity by notice of undocketed judgment.

And equity would assist a judgment creditor to the partial equitable interest of his debtor, in those cases in which he would have been entitled to execution under the Statute of Frauds in case the debtor had owned the entire beneficial interest ;(c) but he was obliged to sue out an *elegit* before filing his bill.(d)

Equity aided judgment creditor against equitable estates.

But the judgment creditor acquired no preference in bankruptcy, unless execution had been sued before the issuing of the fiat or commission.(e)

Judgment, how affected by bankruptcy.

It followed, from what has been above stated, that a purchaser who, before execution sued,(f) got in an outstanding legal estate, (even a mere satisfied term,) or procured a declaration of trust in his favor by the trustee, or who, (as in the case of a mortgagee purchasing the equity of redemption,) was himself seised or possessed of the legal estate, was protected from judgments of which he had no notice(g) at the time of his purchase ; but of course, where the outstanding estate was less than the fee \*simple, it was no protection against subsisting judgments of a date prior to its creation ; and the want of notice was essential in equity.

Purchaser without notice protected by legal estate.

[\*233]

But the exercise of a power of appointment defeated a judgment entered up subsequently to the creation of the power, and notice in this case was immaterial,(h) for the judgment only affected the estate limited until and in default of appointment.

Purchaser under power of appointment, not affected by judgments, notwithstanding notice.

A judgment entered up against the vendor, subsequently to the contract but before conveyance, was immaterial

Effect of judgment after contract.

(b) *Ibid.* 51 ; Sug. 661.

(c) *Prid.* on J. 25.

(d) *Neate v. Duke of Marlborough*, 3 Myl. & C. 407 ; *Smith v. Hurst*, 1 Coll. 705.

(e) 6 Geo. IV. c. 16, s. 106 ; see now 12 & 13 Vict. c. 106, s. 184 ; and see Coote on Mortgages, 3rd ed. 68.

(f) Sug. 659.

(g) *Tunstall v. Trappes*, 3 Sim. 286, 299.

(h) 3 Sim. 300 ; *Eaton v. Sanxter*, 6 Sim. 517 ; *Shceles v. Shearly*, 3 Myl. & C. 112.

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in equity,(i) except that it formed a lien upon such part (if any) of the purchase-money as remained unpaid:(k) and an ejectment against a purchaser in possession, by a creditor who had sued out an *elegit* on such a judgment, would be restrained by injunction:(l) so, also, a trust for sale, if well created, was not affected by subsequent judgments; nor, if the trustee had power to give receipts, were the judgment creditors necessary parties to the conveyance:(m) nor was it material that the sale was not by the trustees, but by the court;(n) and the same, it is conceived, is the rule under the new law.

Extended  
legal remedies  
of  
creditor  
under new  
law.

[\*234]

By the 11th section of the 1 & 2 Vict. c. 110, (as modified by the 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82,) a judgment, duly registered, entitles the creditor to take in execution, except as against purchasers or mortgagees who became such before the 1st day of October, 1838, and also purchasers and mortgagees without notice,(o) an entirety of "all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person "against whom execution is so sued, or any person in trust for him, shall have been seised, or possessed, at the time of entering up(p) the said judgment, or at any time afterwards; or over which such person shall, at the time of entering up such judgment or at any time afterwards, have any disposing power, which he might, without the assent of any other person, exercise for his own benefit." [1]

(i) Sug. 653.

(k) Prid. on J. 21.

(l) *Brunton v. Neale*, 14 L. J., N. S., Ch. 8.

(m) *Lodge v. Lyseley*, 4 Sim. 70.

(n) *Alexander v. Crosby*, 1 J. & L. 672.

(o) 2 & 3 Vict. c. 11, s. 5.

(p) That is, the day on which judgment is originally signed in the Master's book, not the day on which the roll is carried in and the judgment is entered of record; and this, although the original entry in the Master's book be subsequently amended on a revision of the taxation of costs: *Fisher v. Dudding*, 3 Man. & G. 238; *Newton Grand Junction Railway v. Company*, 16 Mee. & W. 142; but see *Peirce v. Derry*, 4 Q. B. 635.

[1] In New York, a judgment is a lien on the real estate of the debtor, from the docketing of the same, and it affects equally his after-acquired

Under these provisions, it will be observed that, under an *elegit*, the creditor can take the entirety (instead of a

lands with the exception of mortgages taken at the time of purchasing the after-acquired lands for the security of the purchase money. But it ceases to be a charge on the land, as against purchasers in good faith, and as against subsequent incumbrancers, from and after ten years from the docketing of the same, and every judgment is presumed to be satisfied, after twenty years from the signing and filing of the record; and the presumption can only be repelled by a written acknowledgment of indebtedness, or by proof of payment or part within the twenty years. N. Y. R. S. vol. 2, 182, secs. 96, 97; 359, sec. 3, 301.

In Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, and Vermont, the judgment is no lien, and the lands are not bound until execution issued; but the land may be attached, in the first instance, on mesne process. *Wallace v. McConnell*, 13 Peters' Rep. 136; *Tyrell v. Roundtree*, 1 McLean's Rep. 95; Rev. Stat. of Mass.; *Perrin v. Leverett*, 13 Mass. Rep. 128; *Taylor v. Mixer*, 11 Pick. Rep. 341; Stat. of Conn. 1838, p. 43; Rev. Stat. of Vermont, 1839, p. 182.

In Kentucky and Mississippi, lands are bound, from the delivery of the execution. 1 Dana's Ken. Rep. 360; Revised Code of Miss. p. 197; *Bank of U. S. v. Tyler*, 4 Peters' U. S. Rep. 366.

In Pennsylvania, the judgment is a lien on the lands owned by the debtor, from the signing of the judgment; but the lien ceases after seven years on judgments *inter vivos* unless received by *scire facias*; and judgments at the death of a decedent, binds the estate for five years, though not revived by *scire facias*, and they do not bind after acquired lands until the execution has issued. Purdon's Dig. 393; 6 Binney's Rep. 135; *Episcopal Academy v. Frieze*, 2 Watt's Rep. 16.

In Louisiana, a judgment is a lien, by being registered with the recorder of mortgages. *Hanna v. His Creditors*, 13 Martin's Rep. 32.

In Illinois, a judgment is a lien on real estate, for a period of seven years. Rev. Stat. of Ill.

In Virginia, executions bind real estate, from the time they are levied; and if the debtor be actually seized, yet during the right of the plaintiff to take out an *elegit*, the judgment is regarded as a lien. *Burton v. Smith*, 13 Peters' Rep. 464.

The judgment is a lien in New Jersey, Delaware, Maryland, Indiana, Ohio, Missouri, Tennessee, South Carolina, Georgia, Alabama, and Louisiana; *Reeves v. Johnson*, 7 Halsted, 29; 1 Green's N. J. Rep. 135; Statute of Indiana, 1826; *Riddle v. Bryan*, 5 Hammond's Ohio Rep. 55; *McCormick v. Alexander*, 2 Ohio Rep. 65; *Earnst v. Winans*, 3 Ib. 135; *Norton v. Beaver*, 5 Ib. 178; *Urbana Bank v. Baldwin*, 3 Ib. 65; 10 Ohio Rep. 74, note; Laws of Tennessee, p. 419; *Miller v. Estill*, 8 Yerger, 452; *Murfree v. Carmack*, 4 Yerg. Rep. 270.

In North Carolina, lands are bound from the entry of the judgment, provided the creditor sues out an *elegit*; but they are only bound by execution, if the creditor sells the land by *feri facias*. *Riches v. Blount*, 4 Dev. Rep. 133; *Jones v. Emmonds*, 2 Murphy's Rep. 43. See 4 Kent's Com. 435, 436.

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mere moiety) of the property ; and this right extends to copyholds, estates subject to a general power of appointment, and, (probably,) terms for years and simple trusts thereof ;(q) and that, as respects legal terms for years(r) and equitable estates generally, the judgment is now binding from the time of its being entered up, instead of, as formerly, from the date of execution.

It is also observable, that the estate of a joint-tenant is extendible as against a surviving joint-tenant, and not, as formerly, merely for the life of the debtor.

It also seems probable, that the judgment creditor of a tenant in tail, (where there is a protector,) can take the land in execution as against the issue in tail ; and that the judgment creditor of a tenant in tail, (where there is no protector,) can take the land in execution, not only as against the issue in tail, but also as against remaindermen.

[\*235] It does not, however, appear, that the creditor acquires any remedy at law against equitable estates, except in \*cases of simple trusts in favor of the debtor ; *e. g.*, it is conceived that an equity of redemption cannot be taken in execution,(s) but that land held simply in trust for the debtor at the date of the judgment can be taken in execution, notwithstanding intermediate alienation, (unless to an alienee for valuable consideration and without notice.)

And by the 13th section of the 1 & 2 Vict. c. 110, (as modified by the two later acts,) a registered judgment is (except as against purchasers or mortgagees without notice, or who became such before 1st October, 1838,) made to "operate as a charge upon all lands, tenements, rectories, advowsons, tithes,(t) rents, and hereditaments (including lands and hereditaments of copyhold or customary tenure) of or to which such person shall at the time of

Extended equitable remedies of creditor under new law.

(q) Prid. on J. 68 ; Sug. 667 ; see however Coote on Mortgages, 3rd ed. 44.

(r) Sug. 667.

(s) Sug. 665.

(t) It has just been decided by V. C. Rolfe that a registered judgment against a spiritual incumbent operates, under this section, as a charge on the tithes and other profits of the living ; *Hawkins v. Gathercole*, 14 Jur. 1103.



entering up such judgment, or at any time afterwards, be <sup>Chap. XI.</sup> seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall at the time of entering up such judgment or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents, and hereditaments; and that every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of the act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments and had by writing under his hand agreed to charge the same, with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment."(tt)[1]

[\*236]

(u) See *Smith v. Hurst*, 1 Coll. 705. As to the form of decree which may be obtained by a judgment creditor, see *Carlton v. Farlar*, 8 Beav. 525.

[1] A mortgage not registered, has a preference over a subsequent docketed judgment. A mortgage unregistered, is still a valid conveyance, and binds the estate, except as against subsequent *bona fide* purchasers and mortgagees whose conveyances are recorded. Consequently, if the purchaser at the sale on execution, under the judgment has his deed first recorded, he will then gain a preference by means of the record over the mortgage, and the question of right turns upon the fact of priority of the record, in cases free from fraud. So also, in the case of purchasers deriving title respectively under a fraudulent grantor, and a fraudulent grantee. In Pennsylvania however, the docketed judgment is preferred. 4 Kent, 173, and authorities.

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Judgment,  
how now  
affected by  
bankruptcy.

These provisions leave no doubt as to the rights in equity of a judgment creditor of a tenant in tail.

So, in a case of bankruptcy, the judgment creditor would seem, under the 13th sect. of the act, to have all the rights of an equitable mortgagee,[1] provided that the judgment was entered up twelve months before the issuing of the fiat :(*u*) in the case of a judgment entered up under a warrant of attorney, and of the subsequent insolvency of the debtor, the judgment creditor's security is not affected by the 61st section of the act.(*w*)

The recent Bankruptcy Law Consolidation Act(*x*) avoids warrants of attorney to confess judgment in any personal action and being for or in respect of, wholly or in part, an antecedent debt or money demand and every *cognovit actionem* or consent to a judge's order for judgment in any action commenced by collusion with the bankrupt or not adversely, or purporting to be given in an

(*u*) Sect. 13 of Act; and see *Rolleston v. Morton*, 1 Dru. & W. 195, and 12 & 13 Vict. c. 106, s. 184.

(*w*) *Holham v. Somerville*, 9 Beav. 63.

(*x*) Sect. 135; and see ss. 136, 137.

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[2] In New York, it was held that a voluntary conveyance, made by a debtor, of his real estate, on a nominal consideration, in trust, to sell the same, and out of the proceeds to pay all his creditors who should come in and prove their debts, and execute releases of their demands, is fraudulent, and not entitled to a preference over a previous judgment entered by confession, on a warrant of attorney, though without a specification of the particulars, as required by the statute, (sess. 41, c. 259, s. 8:) for such judgment is good against the debtor himself, and is fraudulent only as respects *bona fide* judgment creditors, and *bona fide* purchasers; that is, purchasers in the usual and popular sense of the term, as distinguished from creditors. *Seaving v. Brinkerhoff*, 5 Johns. Ch. Rep. 320. Where the defendant in a judgment, who was imprisoned upon a *capias ad satisfaciendum*, subsequently obtained his discharge under the act to abolish imprisonment for debt, and make an assignment of his property; and the assignees afterwards conveyed all his interest in his real estate to the plaintiff in the judgment, without any consideration whatever. Held, that such conveyance was invalid, and transferred no right to the equitable interest of the judgment debtor in the land, to the grantee in such conveyance. *Patridge v. Havens*, 10 Paige, 618. Held, also, that by the arrest of the judgment debtor upon the *ca. sa.*, and by his subsequent discharge under the insolvent act, his equitable interest in his real estate, passed to his assignees, discharged of any equitable lien thereon, by virtue of the judgment. *Ib.*

action, but having been in fact given before the commencement of any action against him, in cases where the same respectively are given on or after the 11th October, 1849, and within two months before filing the petition in bankruptcy and the bankrupt at the time of giving the same is unable to meet his engagements; whether they be given in contemplation of bankruptcy or not. [\*237]

The recent important case of *Whitworth v. Gaugain*(y) seems to show that the statements in the text books that a judgment under the new law operates as a specific charge upon the debtor's lands, must be received with very serious qualification, if in fact the expression be any longer applicable: this case established the following principle: viz., that where a debtor has merely a modified or qualified interest in the lauds, as where he holds them wholly or in part as a trustee, or subject to any previous incumbrance, whether legal or merely equitable, the judgment must be considered as the statutory equivalent to his written agreement to charge, not the lands themselves, but merely that which he may rightfully charge, viz., his beneficial interest (if any) in them; so that the judgment creditor, although he subsequently acquire the legal estate, is postponed to a *cestui que trust*, or a prior equitable incumbrancer who advanced his money upon the security of the specific property.

Judgment creditor postponed to *cestui que trust* or prior equitable incumbrancer.

In the recent case of *Harris v. Davison*,(z) Sir L. Shadwell, V. C., with reference to the 13th section of the 1 and 2 Vict. c. 110, said that he "could not conceive any set of words better adapted to describe every possible interest in lands of every possible description; they are as comprehensive as possible, and include lands of every tenure, except, perhaps, lands held in ancient demesne;" he then decided that a registered judgment operated as a charge upon the beneficial interest of the debtor (the grantee of a personal annuity) under a trust for sale of leaseholds for better securing the payment of the said annuity: this decision (which seems to involve the necessity of a search

*Harris v. Davison.*

Judgment whether a charge on

(y) 1 Phil. 728; and see *Newlands v. Paynter*, 4 Myl. & Cr. 408; *Langton v. Horton*, 1 Ha. 549, 560.

(z) 15 Sim. 128.

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mortgage .  
debt.

for "judgments against a mortgagee upon taking a transfer of, or paying off the mortgage debt) has, it is understood, been to a considerable extent disregarded in practice by conveyancers.(a)

Is a charge  
on annuity  
issuing out  
of land.

But an annuity given by a will, and charged upon, or issuing out of land, is an interest in land within the statute ;(b) so that a search for judgments against such an annuitant will be necessary, if his annuity is to be released or dealt with.

And prob-  
ably on legacy  
charged on  
land.

The same, it is conceived, must be the rule as to a legacy charged upon land.

So, on unpaid  
purchase-  
money,

A judgment entered up against the vendor after a contract for sale, is, as formerly, an equitable charge upon the unpaid purchase-money ; although execution cannot be levied upon it ;(c) and so, upon a sale by a mortgagee, the surplus proceeds of sale are charged by judgments entered up against the mortgagor subsequently to the mortgage.(d)

and on sur-  
plus pro-  
ceeds of sale  
by mortga-  
gee.

Certain de-  
crees and or-  
ders have the  
effect of judg-  
ments.

By the 18th section of 1 and 2 Vict. c. 110, decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the lord chancellor, or of the court of review (while it existed) in matters of bankruptcy,(e) and all orders of the lord chancellor in matters of lunacy, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, are to have the effect of judgments.

[\*239]

Remedies un-  
der new law  
depend upon  
registration.

And by the 19th and 21st sections of the same act, in "order that any judgment, decree, order, or rule, may become operative under the act as against purchasers, mortgagees, or creditors, a memorandum thereof must be left for registration(f) with the senior master of the Common

(a) See Mr. Christie's evidence before the Registration Commissioners, 1st report ; but see also *Clare v. Wood*, 4 Ha. 61 ; Coote on Mortgages, 3rd ed. 44 : the general and safer practice appears to be to make the search.

(b) *Younghusband v. Gisborne*, 1 De G. & S. 209.

(c) *Brown v. Perrott*, 4 Beav. 585.

(d) *Robinson v. Hedger*, 13 Jur. 846 ; 14 Jur. 784, V. C. E.

(e) And see now 12 and 13 Vict. c. 106, ss. 123, 248.

(f) Notwithstanding these are the words of the act, it may be doubted

Pleas at Westminster; or, (in the case of a judgment obtained in the courts of Lancaster or Durham,) with the prothonotary, or deputy prothonotary, or other appointed officer of such courts respectively; and by the 2 and 3 Vict. c. 11, the old dockets were closed, and judgments then docketed were not to affect lands, &c., as against purchasers, mortgagees, or creditors, after the 1st August, 1841, until a memorandum thereof was left for registration at Westminster under the 1 and 2 Vict. c. 110; and, as respects judgments registered at Westminster, a fresh memorandum was required to be left for registration every five years; (g) so that in no case need a search at Westminster extend back for more than five years; but the search for the five years preceding the purchase should be made, not only as against the present vendor, but also against former owners, although more than five years may have elapsed since they parted with the property.

It may be here observed, that where a judgment is registered after the expiration of more than five years from the date of the last registration, there seems to be nothing in the act to affect its validity, except as against purchasers or mortgagees claiming under an instrument executed between the expiration of such period of five years, and the subsequent registration.

Neglect to re-register within five years—effect of.

No provision seems to be made for the fresh registration of judgments, &c., in the Palatinate Courts of Lancaster and Durham; the 4th section of the 2 and 3 Vict. c. 11, clearly (\*as it appears) referring merely to those judgments, &c., which must be originally registered with the senior master of the court of Common Pleas at Westminster: therefore, upon a purchase of lands in one of the counties Palatine, the search in the local index should, it is conceived, be carried back as far as was usual under the old practice; viz., in ordinary cases, ten years from the date of the search, or ten years from the earliest registered judgment, if any were met with; and, since lands in a county Palatine may be extended on a judgment ob-

Fresh registration of judgments in Palatinate courts, whether necessary.

[\*240]

What searches should be made in purchasing estates in counties Palatine.

whether the judgment would bind purchasers, etc., if the officer having received the memorandum were to omit to register it.

(g) See ss. 1, 2, and 4, of 2 and 3 Vict. c. 11.

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tained in one of the superior courts at Westminster, it will also be proper to search the register at Westminster. (h)

Judgments in  
Palatinate  
courts, whether  
binding on  
purchasers  
without notice.

And there seem to be grounds for contending that judgments registered in the Palatinate courts have their full effect under the 1 and 2 Vict. c. 110, even as against purchasers and mortgagees without notice; inasmuch as the words "as aforesaid," in the 5th section of the 2 and 3 Vict. c. 11, seem to identify the judgments, decrees, &c., mentioned in that section, with those mentioned in the preceding section; and those, as before observed, appear to be such only as are required to be registered with the senior master of the Common Pleas at Westminster: and a similar question seems to arise as to the applicability of the 2nd section of the 3 and 4 Vict. c. 82, the Palatinate judgments.

Purchaser  
with notice  
of unregistered  
judgment, how  
far liable.

A purchaser with notice of an unregistered judgment is protected (i) from the additional remedies of the judgment creditor under the 1 and 2 Vict. c. 110; and, since the old dockets are closed, he is equally safe from any remedy which, under the old law depended upon docketing; but it is conceived to be doubtful whether a purchaser with notice of an unregistered judgment is not still bound in equity to the same extent as he would have been bound \*under the old law by notice of an undocketed judgment; for instance, whether, if purchasing from an owner in fee simple, he would not be liable in equity to have a moiety of the land subjected to the claim of a creditor of whose unregistered judgment he had notice at the time of advancing his money; although, if purchasing under a power of appointment, he might altogether disregard unregistered judgments against the vendor of a date subsequent to the creation of the power; inasmuch as, under the old law, the exercise of the power defeated such judgments as well in equity as at law: it has even been made a question whether a purchaser may not at law be bound by a judgment neither docketed nor registered in the same way as he would have been bound by it before the act of

[\*211]

(h) Prid. on J. 119.

(i) 3 and 4 Vict. c. 82; *quere*, as to Palatinate judgments. *Vide supra*.

William and Mary :<sup>(k)</sup> but the point does not seem to be one of real difficulty.<sup>(l)</sup> Chap. XI.

It appears, however, to be the opinion of Sir *E. Sugden* that where a judgment has been once docketed under the old acts, but has not been registered under the 1 and 2 Vict. c. 110, or where a judgment having been registered under that act has not been re-registered at the end of five years, under the 2 and 3 Vict. c. 11, a purchaser for value, although aware of its previous docketing or registration, may presume that it has been satisfied.<sup>(m)</sup>[1]

Judgment docketed but not registered, or registered but not re-registered presumed to be satisfied.

(k) Coote on Mortgages, 50.

(l) Sug. 667.

(m) *Beere v. Head*, 3 J. & L. 340; and see *Bedford v. Forbes*, 1 Car. & K. 33 (Creswell); and upon the Irish acts, *Knox v. Kelly*, 1 D. & Wal. 542; *Hickson v. Collis*, 1 J. & L. 94.

[1] In the state of New York, previous to the revised statutes, a judgment in a court of record in that state was a lien upon the lands of the judgment debtor from the time of the entry thereof, whether docketed or not. But if the judgment was not properly docketed, it did not affect the lands of the judgment debtor, as against subsequent purchasers or mortgagees. *Buchan v. Sumner*, 2 Barb. Ch. Rep. 165; vide 1 R. L. of 1813, p. 501, s. 3. But even as to them, the undocketed judgment was entitled to priority in equity, if the purchaser or mortgagee had notice of its existence at the time of his purchase, or when he took his mortgage. Vide 16 Ves. Rep. 420. And the first judgment was entitled to a preference, although not docketed, over the lien of a junior judgment which had been docketed. But, if the land of the debtor had been sold by the sheriff, under an execution upon the junior judgment, to a purchaser who had no notice of the prior judgment, such purchaser took the land discharged of the lien of the elder judgment. *Ib.* But under the New York revised statutes, no judgment will affect any lands, tenements, real estate, or chattels real, or have any preference as against other judgment creditors, until the record thereof has been filed and docketed. *Ib.* Vide 2 N. Y. R. S. 360. The effect of the new provision of the statute, is to prevent the common law of the judgment from attaching at all upon the real estate of the judgment debtor until the judgment has been actually docketed; and not merely to protect bona fide purchasers and incumbrancers who had no notice of the existence of the judgment when their interest in, or liens upon the real estate of the judgment debtor accrued. And the provisions of the act of May 14, 1840, on this subject, are also in accordance with this construction of the revised statutes. *Ib.* The fact that an error which occurred in the docketing of a judgment, was the error of the clerk, and not the fault of the judgment creditor, or of his attorney, will not authorize the court of chancery to interfere to deprive another judgment creditor of his legal priority if he has obtained one by such error. *Ib.* Vide 3 Russ. Ch. Rep. 349; 2

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Crown debts  
and account-  
antships.

[\*242]

Except in the case of copyholds,<sup>(n)</sup> search should be made at the Common Pleas for debts and accountantships to the crown; and the search must not be confined to the last five years, as fresh registration of these liabilities is not required; and as the 8th section of 2 and 3 Vict. c. 11, is not retrospective,<sup>(o)</sup> it will still, for some time to come, \*be often expedient to ascertain (if possible) by searches at the exchequer office, and among the receiver-general's bonds at the tax office,<sup>(p)</sup> that no such liability was subsisting before the 4th June, 1839, when the 2 and 3 Vict. c. 11, came into operation. The claim of the crown, it may be observed, extends to equities of redemption; and is not defeated by the execution of a power of appoint-

(n) *Aldrich v. Cooper*, 8 Ves. 394; Scriv. on Cop. 88. But the exception does not seem to extend to terms for years in copyholds. Prid. on J., 3rd edition, 155.

(o) Sug. 673.

(p) 1 Jarm. Conv. by S. 112.

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Crompt. & Jerv. Rep. 318. It is not necessary to docket a judgment of the supreme court, to enable the plaintiff to sell the defendant's interest in lands upon an execution. *Clark v. Dakin*, 2 Barb. Ch. Rep. 36; S. P. 3 Sandf. Ch. Rep. 597. Vide 10 Paige, 325; 1 Barb. Ch. Rep. 571. A judgment recovered previous to the passage of the law requiring judgments in the supreme court to be docketed in the several counties, is a lien upon all the lands of the defendant in any of the counties of the state, without being docketed in each county. Ib. The revival of a judgment by *scire facias*, does not render a second docketing of such judgment necessary, so far as respects the original debt and costs. Ib. Since the act of New York of May, 1840, concerning costs and fees in courts of law, etc., it is not necessary for the registers or clerks of the supreme court to docket decrees or judgments in the books of their own offices; and if done, it will not affect the rights of either of the parties to the decree or judgment, or cast a cloud upon the title of the defendant in such suit to his real estate. *Johnson v. Fitzhugh*, 3 Barb. Ch. Rep. 360. In the state of New York, although the statute respecting the docketing of judgments does not declare in express terms, that the judgment shall be entered by the clerk in the alphabetical docket, under the letter corresponding with the surname of the judgment debtor, yet such has been the practical construction which has been given to the statute for more than a quarter of a century; and it is the only sensible construction which can be given to it. *Buchan v. Sumner*, 2 Barb. Ch. Rep. 165. It was accordingly held, that the docketing of a judgment against P. S. under the letter P., the initial letter of his christian name, instead of the letter S., the initial of his surname, was not even a substantial compliance with the requirements of the statute. Ib. See Amer. Ch. Dig. by Waterman, vol. 2, p. 494, 495.



ment,(*q*) or the assignment of a term already held in trust for the debtor or accountant;(r) and the lands of an accountant are liable for moneys which become due from him even subsequently to alienation.(s) Chap. XI.

It is, as a general rule, proper to search the register at Westminster for *lis pendens*; this search need not go further back than five years. *Lis pendens.*

When the property is copyhold, the court rolls(*t*) should be searched for incumbrances, &c., not appearing on the abstract; so, where the property lies in a district subject to the register acts, viz. Middlesex, Yorkshire, Kingston-upon-Hull, and the Bedford Level, searches should be made in the local registers: these searches should be extended over the whole period covered by the abstract: copyholds, however, are excepted out of the register acts of Yorkshire, Middlesex, and Kingston-upon-Hull;(u) but it is doubtful whether the exception extends to leases of copyhold estates.(w) Court rolls and local registers.

In many cases, it may be proper to search the courts of bankruptcy and insolvency; purchasers without notice \*were protected by the 2 and 3 Vict. c. 11, s. 12, and 2 and 3 Vict. c. 29, against acts of bankruptcy upon which no fiat had actually issued, the provisions of these statutes are repealed, but in effect re-enacted by the recent consolidation act;(x) and notice of an act of bankruptcy is immaterial, if twelve months have elapsed without a fiat issuing or a petition for adjudication in bankruptcy being filed thereupon.(y) Bankruptcy and insolvency courts. [\*243]

Sir E. Sugden says, that it is "the duty of the purchaser- Annuities.

(*q*) Prid. on J. 154; *Reg. v. Ellis*, 19 L. J., N. S. 77, Exch.

(*r*) Sug. 673.

(*s*) Sug. 674: as to who are liable as accountants, see 13 Eliz. c. 4; and Prid. on J. 159, *et seq.*

(*t*) But the purchaser before admittance appears to have no right of inspection: Scriv. on Cop. 493, 4th ed.: the tenant, or any person claiming an interest under the court rolls, can compel inspection by *mandamus*, *ibid.* 533, and cases cited: see *Ex parte Cooke*, 5 Dow. & L. 413.

(*u*) Scriv. on Cop. 1113.

(*w*) Sug. 980.

(*x*) Sect. 133.

(*y*) 5 and 6 Vict. c. 122, s. 7; 12 and 13 Vict. c. 106, ss. 88, 134.

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er's solicitor to search for annuities";(z) Mr. Jarman, on the contrary, states that "in ordinary cases the search can scarcely be recommenced";(a) the general practice is believed to accord with the latter opinion.

We may here remark that the principle of general charges upon property is strongly disapproved of by the present registration commissioners;(b) and that the law upon the subject will not improbably be submitted to the further consideration of the legislature.

Recovery  
deeds and  
acknow-  
ledgments  
by married  
women.

Where the estate has been entailed, or has belonged to married women, it may be proper, in special cases, to search for inrolled deeds and acknowledgments under the 3 and 4 Will. IV. c. 74; but such a search, it is conceived, is not usual in practice, unless there is reason to suspect the existence of suppressed documents.

(3.) *Time for making searches and inquiries.*

Searches,  
&c., when  
to be made.

[\*244]

Whatever searches and inquiries are deemed necessary, should, of course, be brought down to a point as close as possible to the time fixed for completion: some practitioners make the search immediately after obtaining an opinion upon the abstract, and a supplemental search \*immediately before completion; but the more ordinary course it is conceived, is to make but one search, and that immediately before completion.[1]

Unneces-

. We may here remark, that a solicitor will not be allowed

(z) Sug. 677.

(a) 1 Jarm. Conv. by S. 118.

(b) See the 1st Report.

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[1] The search for judgments should be postponed to the last moment, lest any should be entered up, between the search and the completion of the conveyance. But the vendor, or his attorney, should be asked, at once, in writing, whether there are any incumbrances which do not appear upon the abstract. If he answer in the negative, and upon search at the latest period, any such should exist, and the purchase cannot, on that account, be completed, the purchaser might recover all of his expenses from the vendor, including even the expense of the conveyance. If an early search be made, and there is any reason to suspect the seller, the register should again be inspected, immediately before the execution of the conveyance. See 2 Sug. on Vend. p. 270.

upon taxation, even as between solicitor and client, the costs of searches directed by counsel, but which have, to the knowledge of the solicitor, been rendered necessary by subsequent events.(c)

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sary costs of  
not allowed.

## \*CHAPTER XII.

[\*245]

### AS TO THE PREPARATION OF THE CONVEYANCE.

1. *General matters relating to, and to the form of.*
2. *As to the parties.*
3. *The recitals.*
4. *The consideration—words of conveyance—and parcels.*
5. *Covenants.*
6. *The draft and engrossment.*

(1.) UPON a sale in consideration of a gross sum, the purchaser, having accepted the title, is bound to prepare the conveyance, and tender it for execution to the vendor;(a) and reason seems to favor the same rule even where the consideration is a rent-charge, although the practice in such cases appears to be unsettled.(b)[1]

Purchaser's  
prepares  
conveyance.

(c) *Langford v. Mahony*, 3 J. & L. 97.

(a) Sug. 263.

(b) 9 Jarm. Conv. by S. 518.

[1] When the seller of a tract of land covenants that upon payment of the purchase money he will convey a good title to the purchaser, it would seem that the seller, having agreed to convey, should prepare the deed of conveyance; for this is the substance of the agreement. It is most convenient, also, and more agreeable to the the natural order of things that this should be done by the seller; because the title deeds are in his possession, and without them a conveyance cannot be drawn. Formerly, in England, the conveyance was prepared by the seller. The change which has taken place in the practice in that country is mainly to be attributed to the changes which surround titles of land, since the introduction of the mode of conveying, founded on the statutes of uses; but even now, it is incumbent on the seller to furnish an abstract of all the title papers

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Manorial custom, that steward prepare all surrenders, is valid.

Conveyance of equitable interest.

Preparation of conveyance no acceptance of title.

[\*246]

Whether purchaser can require outstanding interests and incumbrances to be got in by separate deed.

A custom in a manor, that the steward shall prepare all surrenders for a reasonable fee, appears to be valid.(c)

Even if a contract for purchase of an equitable interest can in itself amount to a conveyance (d) the purchaser is entitled to a formal assurance, if such appears by the contract to be necessary in order to carry the intention of the parties into effect.(e)

As we have already seen,(f) the preparation of the \*conveyance is not, necessarily, a waiver of objections to or requisitions upon the title.

It has been held, that a purchaser cannot compel the vendor to get in an outstanding equitable interest by a deed distinct from the general conveyance;(g) it is, however, conceived that this doctrine must be applied with hesitation;(h) and that, subject to the question of expense,(i) a purchaser may generally object to have his conveyance incumbered with matter arising from the complicated state of the title:(k) indeed, it may often, especially when the property is likely to be much sub-divided,

(c) *Rex v. Rigge*, 2 B. & Al. 550; *Reg. v. Bishopstoke* (Lord of Manor of,) 8 Dowl. P. C. 608.

(d) But see, as to this, *supra*, p. 115.

(e) *Fenner v. Hepburn*, 2 Y. & C. C. C. 159.

(f) *Supra*, p. 218.

(g) *Reeves v. Gill*, 1 Beav. 375.

(h) Sug. 690.

(i) As to which, *vide infra*, Ch. XIII.

(k) See *Jones v. Lewis*, 11 Jur. 511; and 1 De G. & S. 245; stated *infra*.

to be submitted to the purchaser's counsel. It is evident, however, that what may be a very convenient practice in England may be very inconvenient here. In the present situation of this country, there is no difficulty in preparing a deed of conveyance, and therefore no pretence for dispensing with what appears to be the plain meaning of the parties; that is to say, that when the seller covenants that he will convey the title to the purchaser, he shall himself prepare and tender the deed of conveyance. See *Switzler v. Hummel*, 3 Serg. & Rawle, 228; *Hudson v. Swift*, 20 Johns. Rep. 27; *Fuller v. Hubbard et al.*, 6 Cowen, 1; *Johnson v. Wygant*, 11 Wend. Rep. 48; *Green v. Reynolds*, 2 Johns. Rep. 207; *Jones v. Gardner*, 10 John. 266; *Parker v. Parmele*, 20 John. 130; *Northrup v. Northrup*, 6 Cowen Rep. 296; *Slocum v. Despard*, 8 Wend. 615; *Brown v. Bellows*, 4 Pick. 179; *Hunt v. Livermore*, 5 Pick. Rep. 395; *Dana v. King*, 2 Pick. Rep. 155.

be most desirable to avoid any reference upon the conveyance to a voluminous although apparently satisfactory earlier title. Chap. XII.

So, it is conceived, that (subject to the question of expense) a purchaser may insist on keeping off the face of his conveyance any matter which, although agreed to be waived as an objection, yet tends to throw a doubt upon the title; or any collateral matter which may hereafter embarrass the proof of the title: if, for instance, trustees were to sell under circumstances not necessarily appearing upon the face of the conveyance, but amounting to a breach of trust, and the *cestuis que trust* agreed to confirm the sale, the purchaser might, it is conceived, insist upon taking this confirmation by a separate deed; for to include it in the conveyance would oblige him upon a resale to prove who were the parties beneficially interested, and might give rise to questions which would have been wholly immaterial to a sub-purchaser without notice of the breach of trust.

May require confirmation of doubtful title by separate deed, *semble*.

It may, in fact, be laid down as a general rule in preparing conveyances, that not only should all objectionable or doubtful matter be kept off the title, but that nothing should be brought on to it the introduction of which is not evidently necessary or expedient; in proportion as additional matter is introduced into a deed, and additional persons are made parties to it, the chances of some error or ambiguity existing in it are increased. [\*247]

All unnecessary matters and parties to be kept off conveyance.

So, a purchaser from a tenant in tail, may, it is submitted, insist upon the property being disentailed by a separate deed; and may reasonably object to any unnecessary exposure of his title in a public office.

Disentailing deed to be kept distinct from conveyance.

The Lands Clauses Consolidation Act, 1845, and the earlier Railway and other similar Acts, contain statutory forms of conveyance to the several companies; but the use of these forms, in preference to the ordinary instruments of assurance, is not obligatory, or usual; nor does it appear to be expedient.<sup>(1)</sup>

Statutory forms of Railway Conveyances ineligible.

The same remarks apply, and with greater force, to So are the short parties.

(1) *Frend. & Ware's Rail. Conv.* 133.

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mentary  
forms of  
1845.

certain short forms authorized by acts passed in the session of 1845 ;(*m*) such enactments are either unnecessary or mischievous ;—unnecessary, if the parliamentary form would, if unauthorized by Parliament, merely express in fewer words the meaning of the forms in ordinary use ; and mischievous, if an unnatural and secondary meaning is given by statute to words which are *prima facie* clear and intelligible ; for the effect is, to increase the difficulty of legal documents to the unprofessional reader : for instance, a lessee who has, in the usual way, covenanted not “to carry on any trade or business” upon the demised premises, may feel a reasonable and saving doubt whether he is safe in using them for a school ;(*n*) but, unless more addicted than is customary to the perusal of acts of Parliament, he probably will scarcely suspect that such an occupation \*is forbidden by an engagement, not to “use premises as a shop ; which is, nevertheless, the statutory equivalent to the ordinary covenant.(*o*)

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Incumbrances, upon a sale in lots to be got in by separate deed.

Upon a sale in lots of an estate subject to an incumbrance which is to be paid off out of the purchase-money, much expense may be saved by taking a release to the vendor, instead of making the incumbrancer concur in the several conveyances ; and this, when the parties are on good terms, is usually acceded to ; although it might, probably, be resisted, either by a purchaser, or by the incumbrancer.

Incumbrances kept on foot for purchaser's benefit should be assigned to trustees, or declaration of trust should be taken.

Where, as is often desirable, a subsisting incumbrance is to be kept on foot for the purchaser, a mere declaration of intention should not be relied on, but the sum itself, and also the term for years, if there be one for securing it, should be assigned to a trustee for the purchaser : or a declaration of trust should be executed by the incumbrancer,(*p*) and the legal owner of the term.

Distinct estates or

And it may be remarked, that it is generally inexpedi-

(*m*) See 8 & 9 Vict. c. 119 ; and, as to Leases, c. 124.

(*n*) See *Doe d. Bist v. Keeling*, 1 M. & Sel. 95.

(*o*) See 2nd schedule to 8 & 9 Vict. c. 124.

(*p*) *Medley v. Horton*, 14 Sim. 226, 229 ; *Watts v. Symes*, 16 Sim. 640 ; see, on the same subject, Coote on mortgages, 3rd. ed. 394 ; 9 Jarm. Conv. by S. 213, 214.

ent, and, eventually, false economy, to comprise several distinct estates or matters in a single deed.

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matters<sup>\*</sup> should be dealt with by separate deeds.

As to act for mortgages of satisfied terms;—to what it applies.

As a general rule, the assignment of satisfied terms is rendered unnecessary or impracticable by the act of 8 & 9 Vict. c. 112: the act, however, does not appear to extend to copyholds, or customary freeholds ;(q) and it seems doubtful whether either the 1st or 2nd section extends to any hereditaments other than "land" technically so called.(r)

Where, before the passing of the act, A., who, although not in fact, yet believed himself to be, the owner of a \*freehold estate, mortgaged it to B., and an old term for years was at the same time assigned to a trustee, in trust for B. and to attend the inheritance, it was held, that this term could not, after the 31st December, 1845, be used in ejectment on behalf of a person claiming the estate by a title paramount to that of A., although it might, if requisite, have been used as a defence by B.(s)

*Doe v. Price.*

[\*249]

In a later case, where, before the passing of the act, a term was declared to be held in trust for securing a mortgage debt, (part of which was money for securing which the term had been originally created, and the entirety of which was secured by, as was supposed, a mortgage of the reversion in fee,) and subject thereto in trust for A. and B., who were supposed to be entitled to the equity of redemption in fee, but the reversion in fee, expectant on the term, was in fact vested in X. under a prior concealed conveyance, and in 1847 A. paid off the mortgage, and subsequently brought an ejectment against X. on the demise of the trustee of the term, the Court of Queen's Bench intimated a doubt whether the payment of the sum due on the original security, by a person supposed to be but who was not in fact the owner of the equity of redemption, rendered the term a satisfied term within the 2nd section of the act: and held that, at any rate, the term had not become attendant on the inheritance, either by express de-

*Doe v. Jones.*

(q) See Dav. Concise Conv. Prec. 3rd ed. 79.

(r) *Ibid.* 75, 79.

(s) *Doe d. Price*, 16 M. & W. 603; and see *Doe v. Mouldsdale*, *ibid.* 689.

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claration—there having been no such declaration—or by construction of law,—for the trust was expressly declared to be for A. and B., who had not the inheritance, although they were supposed to be entitled thereto when the declaration of trust was executed,—and that the term was therefore still in existence.<sup>(t)</sup> This decision, and the accompanying dictum, which, if correct, \*would materially restrict the operation of the 1st section, and go far to reduce the 2nd section of the act to a dead letter, are not understood to have met with general approbation, or to have materially affected the practice of conveyancers.

(2.) *As to the parties.*

Who must  
be parties to  
conveyance.

All persons whose concurrence is necessary in order to give to the purchaser the full benefit of the contract, must, of course, be parties to and execute the conveyance.[1]

(t) *Doe d. Clay v. Jones*, 13 Jur. 824.

[1] Where a deed by its terms, is to be executed jointly and severally, by two persons, and is actually signed by one, such party is bound thereby. *Adams v. Bean*, 12 Mass. Rep. 137. *Cutter v. Whitteore*, 10 Ib. 442. And where one of two joint tenants formally conveys his interest in the land, and the other merely at the close of the deed relinquishes his right to the estate, but both execute the deed, it passes the estate of both. The effect would be the same where a particular tenant of the freehold, and the remainder-man in fee, thus join in a conveyance. *Lithgow v. Kavenah*, 9 Mass. Rep. 161.

A conveyance made by attorney, must be made in the name of the principal. And where a deed is executed by three attorneys it should be acknowledged by all of them, as the act of the principal, not their own. *Fowler v. Shearer*, 7 Mass. Rep. 19; *Bellas v. Hays*, 5 Serg. & Rawle 427; *Andrews v. Hooper*, 13 Mass. 476; *Townsend v. Corning*, 23 Wend. 435; *Townsend v. Hubbard*, 4 Hill 351; 7 Watts, 116; 15 Conn. Rep. 152; 5 Dana, 394; 9 Ohio, 151; 2 McL. 543; 10 N. H. Rep. 470; 2 Serg. & Rawle, 80.

All persons may convey by deed, unless subject to peculiar disabilities. A person blind, deaf, and dumb, may convey, if capable of understanding the nature of the transaction, and expressing himself by signs or writing. And a deed drawn by his directions, will be valid, if he be informed what lands are conveyed by it, though not informed whether it contains any covenants, or whether it is a deed or will. *Brown v. Brown*, 3 Conn. Rep. 299. The deed of an infant, unless apparently beneficial to him, is either void or voidable. It was the ancient doctrine that an idiot or lunatic could not avoid his deed. But it is now settled that the deed of an infant is void, and also that of a lunatic, unless he assent to it on recovering his



And if the title be such that judgment creditors could at law take the property in execution, this alone will entitle the purchaser to require their concurrence; even although equity might by injunction restrain the exercise of their legal right.(u)

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Judgment creditors who might proceed at Law, although they would be restrained in Equity. Stipulation that unnecessary parties shall concur, is binding.

And where it is a term of the contract that certain specified persons shall concur, the vendor cannot decline to procure their concurrence on the ground that they are in fact unnecessary parties.(v)

Upon a sale by a mortgagee under a valid power of sale duly exercised, the purchaser cannot require the concurrence of the mortgagor;(w) although by the mortgage deed the latter agreed to join in any sale, if required.(x)

Purchaser from mortgagee, under power of sale, cannot require concurrence of mortgagor.

Upon the sale of a bankrupt's estate, he is usually made to convey and covenant for title;(y) his covenants, however, are obviously of little value; and it would seem that he cannot be compelled to execute the conveyance:(z) but the Court of Bankruptcy is empowered(a) upon the application of the assignees, or of the purchaser, if the bankrupt

As to making bankrupt a party on sale of his estate.

(u) *Craddock v. Piper*, 14 Sim. 310.

(v) *Benson v. Lamb*, 9 Beav. 502.

(w) *Clay v. Sharpe*, Sug. 523; *Allen v. Martin*, 5 Jur. 239, R.

(x) *Corder v. Morgan*, 18 Ves. 344.

(y) Sug. 706.

(z) 3 Dav. Conv. 413.

(a) See 12 & 13 Vict. c. 106, s. 148; and 6 Geo. IV. c. 16, s. 78.

reason. And such deeds may be avoided by the heirs of the parties. *Webster v. Woodford*, 3 Day Rep. 90; *Lazell v. Pinnick*, 1 Tyler, 247; *Den v. Moore*, 2 South. 470.

All persons may be grantees, because a conveyance is presumed to be beneficial to the purchaser. Thus an insane person, or an idiot, may be a grantee. If the former never recover his reason, or after recovering, never affirm the deed, his heir may avoid it. But an affirmation after such recovery renders the deed unavoidable. If an infant purchase lands he is bound, unless after coming of age, he waive or dissent from the deed. But unless he affirm it after coming of age, his heir may disaffirm it. An alien may be a grantee of lands, and may legally hold them, until they are claimed by the state by escheat. A married woman may be a grantee, but her husband may dissent from the deed, and defeat the estate. If he die without doing it, or even after expressly assenting, the wife may waive the deed. And her heirs may do the same unless she assented after the husband's death. See Hilliard on Real Property, vol. 2, p. 267, 273.

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\*shall not try the validity of the adjudication, or if there shall have been a verdict at law establishing its validity, to order the bankrupt to join in the conveyance; and if he do not execute it within the time directed by the order, then he, and all persons claiming under him, will be stopped from objecting to such conveyance; and all estate, right, or title, which he had in the property, will be as effectually barred as if such conveyance had been actually executed by him: the order would appear to be of course if he do not dispute the validity of the adjudication.(b) It seems doubtful whether a purchaser can, in ordinary cases, require the assignees to procure such an order unless he can throw a doubt upon the validity of the adjudication: if he himself apply for it, the costs would seem to be in the discretion of the court.(c)

Dowress,  
when to be  
made a  
party.

Assignment  
of term,  
whether pur-  
chaser must  
rely on, as a  
bar.

As respects dower, in cases falling under the new law, the concurrence of the wife is, of course, unnecessary; the conveyance by the husband alone being a sufficient bar:[1] in cases falling under the old law, it has been held that the purchaser could not insist on the wife's concurrence if he could obtain an assignment of a legal term for years created previously to the right of dower attaching upon the estate, and of sufficient duration;(d) inasmuch as, if the wife proceeded for her dower at law, she could recover it only with a *casset executio* during the term, and equity would not remove the bar:(e) this, however, does not seem to be a satisfactory reason for the doctrine; as

(b) *Ex parte Bradstock*, 1 Mon. D. & De G. 118.

(c) See note to 9 Jarm. Conv. by S. 261.

(d) Sug. 541; *Mole v. Smith*, Jac. 490; *Maundrell v. Maundrell*, 7 Ves. 567; 10 Ves. 246.

(e) Sug. 541.

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[1] In England, the wife is not entitled to dower in lands sold by the husband in his lifetime, or devised by will, or declared by will, to be exempt from her dower; and all partial estates and interests created by the husband, by any disposition or will, and all debts and incumbrances to which his lands are liable, are declared to be effectual against the claim of dower. A devise of any estate in the land to the widow bars her dower, unless a contrary intention be declared, but not a bequest of personal estate, unless an intention to that effect be declared. Stat. 3 & 4 Wm. IV., c. 105.

not only was the purchaser obliged to incur the expense of keeping the term on foot, but he would have had to pay at least his own costs at law in the event of the dowress availing herself \*of her legal remedy :(*f*) and it would appear that a purchaser can at any rate require the vendor to ascertain, if practicable, whether or no a liability to dower exists, and is not bound to be satisfied with a reply that if such liability exist he may protect himself by means of a term.(*g*) It has been recently decided, by *V. C. K. Bruce*, that an old term for years which upon a purchase prior to the 1st January, 1846, (when the 8 & 9 Vict. c. 112(*h*) came into operation,) was duly assigned to a trustee for the purchaser, is a sufficient protection to a sub-purchaser, purchasing on or after the 1st January, 1846, against the dower of the wife of the original vendor ;(*i*) but such a term, it is conceived, would be no protection to the sub-purchaser against any claim to dower by the wife of such first purchaser ; supposing him to have been seised in fee on the 1st January, 1846. Where a jointure is relied on in bar of dower, the vendor, it would seem, must produce a satisfactory title to the jointure land.(*k*)[1]

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[\*252]

Jointure.

(*f*) See Mr. Jarman's note, 1 Jarm. Conv. by S. 508.

(*g*) *Major v. Ward*, 12 Jur. 473, V. C. W.

(*h*) Rendering the assignment of satisfied terms unnecessary.

(*i*) *Bass v. Wellsted*, 12 Jur. 347.

(*k*) Sug. 542.

[1] The provisions of the 27 Hen. 8, c. 10, relative to jointure, have been very extensively incorporated into the law of this country. It must take effect immediately on the death of the husband ; and must be for the wife's life, and be made and declared to be in satisfaction of her whole dower. If the jointure be made before marriage, it bars the dower ; but if made after marriage, the wife, on the death of her husband, has her election, to accept of the jointure, or to renounce it, and apply for her dower at common law ; and if she be at any time lawfully evicted of her jointure, or of any part of it, she may repair the loss or deficiency, by resorting to her right of dower at common law. In England, adultery is no forfeiture of the jointure, or of articles of agreement to settle a jointure, though it be a bar to dower. A conveyance to trustees for the use of the wife, after her husband's death, is in point of law no jointure ; but such a settlement, if in other respects good, will be enforced in Chancery as an equitable bar of dower. It seems that a jointure on an infant before coverture, bars her dower, notwithstanding her infancy, on the ground of its

(3.) *As to the recitals.*

Recitals to  
be used  
with what  
object.

[\*253]

A difference exists among conveyancers as to the legitimate use of recitals: some practitioners employing such only as will give an insight into the interests and objects of the parties to the deed, sufficient to render the subsequent parts clear and intelligible; while others introduce matter which although clearly irrelevant, *e. g.*, the recital of the probate of a will of real estate, or of the places of burials, marriages, and baptisms, &c., is yet calculated to save trouble upon future investigations of the title: it is submitted, that, as a general rule, no recital should be admitted which has not a logical connection with some operative part of the draft, and that the purpose of the other class of recitals may be well answered by a memorandum indorsed on the deed, and signed by the parties conversant with the facts.[1]

being a provision by the husband, for the wife's support; and the assent of the wife has been held not to be an operative circumstance, though the ante-nuptial contract be executed by the infant in the presence of his guardian. An equitable jointure, or a competent provision for the wife, in lieu of dower, if assented to by the father, or the guardian of the infant, before marriage will also constitute an equitable bar. But the conveyance before marriage, of an estate to the wife, to continue during widowhood, by way of jointure, or if made to depend on any other condition, will not bar her dower, even if she be an adult, unless when a widow, she enters and accepts the qualified freehold. In New York, it is provided by statute, that if "an estate in lands be conveyed to a person and his intended wife, or to such intended wife alone, or to any other person in trust for such person and his intended wife, or in trust, for such wife alone, for the purpose of creating a jointure for such intended wife and with her assent, such jointure shall be a bar to any right or claim of dower; and the evidence of the assent of the wife, shall be, by her becoming a party to the conveyance, if of age, and if an infant, by her joining with her father or guardian therein." N. Y. R. S. vol. 1, 741, secs. 9 and 10. The Stat. 27 Hen. VIII. has been substantially adopted in Massachusetts, Connecticut, Pennsylvania, Ohio, and South Carolina. See 4 Kent Com. 54, 55, 56, 57.

[1] The recital in a deed is a part not absolutely necessary, but commonly used to explain the title of the grantor, and the circumstances and reasons of the conveyance. The recitals, are a key to the construction where the operative part is doubtfully expressed; and they are not to control the latter, though less specific than the recital, where the plain intent would be thereby defeated. *Cole v. Patterson*, 25 Wend. 456; *Schermehorn v. Negus*, 2 Hill, 335; *Powell v. Powell*, 5 Dana, 170; *Hancock v.*

So, in disentailing deeds, whose statutory effect is independent, not only of the motives, but even of the expressed intention of the parties, (m) recitals seem to be in general useless, and therefore inexpedient; especially, since the enrolment of these conveyances in a public office is open to all the objections, and is attended by few of the benefits, incident to registration of titles under the protective statutes: a simple conveyance by A. of a specified estate, or of all the lands held by him as tenant in tail under a specified settlement or in a specified locality, and the mere consent of B. as protector, either generally or under the limitations of any specified instrument, are quite as effective, and in the general as intelligible, as they would be if preceded by the most elaborate statement of the previous title, or of the motives which induce the parties to do that which, when done, takes effect without any regard to motive.

In a late case, a question was raised and not decided, whether, when a purchase-deed contained a recital of the

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Whether  
desirable in  
disentailing  
assurances.

Of vendor's  
title: whe-  
ther pur-  
chaser  
estopped  
thereby.

(m) See 3 and 4 Will. IV. c. 74, s. 21.

*Byrne*, 5 Dana, 514; *Doe v. Porter*, 3 Pike, 18; *Crosby v. Chase*, 5 Shepl. Rep. 369. A general recital in a deed will not conclude a party, though a recital of a particular fact may estop. *Huntington v. Havens*, 5 Johns. Ch. Rep. 23, 26. It is a well settled rule of construction, that a recital cannot control the plain words of the granting part of a deed. *Ib.* As, where a deed of assignment by a debtor, in trust for his creditors, recited that the debtor was desirous to convey his property to secure three of his creditors who were mentioned by name, in full, and the residue for the benefit of his other creditors; and, in the body of the deed, the assignment was expressed to be in trust to pay and satisfy those three creditors, and three others who were named, and the surplus to be divided among the other creditors, it was held, that the three creditors named in the recital were only entitled to be paid rateably with the other three creditors mentioned in the body of the deed, in proportion to their demands. *Ib.* The recitals in a deed—so far as its effect and operation, the responsibilities and obligations arising under it, come in question, are conclusive as to the value of the consideration—not as to its nature or quality. 5 Dana, 170. To give a deed any sensible operation, it must describe the subject matter of the conveyance, so as to denote, upon the instrument, what it is in particular, or by a reference to something else which will render it certain. The want of such a description or reference in a deed, is a defect which renders it totally inoperative. *Kea v. Robeson*, 5 Iredell's Eq. Rep. 373. See American Chancery Digest, by Waterman, vol. 2, p. 2.

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vendor's title, the purchaser upon being evicted was not estopped from questioning the accuracy of such recital in an action on the covenants for title: (n) the contrary appears, however, to have been decided in a later case (o) where the court held that where a recital is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered from construing the instrument.

[\*254]

Whether written agreement should be recited in subsequent deed.

\*Where a deed is executed pursuant to a written agreement, it is generally inexpedient to recite that agreement, and so bring it upon the title, unless it be material to the full operation or validity of the deed; as in the case of a post-nuptial settlement, where it is generally proper to recite prior articles, in order to show that the settlement is not voluntary.

Recitals of objections in deed of confirmation.

Where a person executes a deed for the purpose of removing objections to the title, and the deed merely mentions their existence, without specifying them or showing that objections have been withheld from him, and he asks no questions, he will, as between himself and the purchaser, be bound, although in fact unaware of their real nature: (p) and it is presumed, that a person executing such a general confirmation, even although in fact deceived as to the real nature of the objections, would be bound, if the purchaser had no notice of the deception: a general confirmation would appear to be the most eligible for the purchaser; but the party confirming should insist on the particular objections being specified, and should in terms confine his confirmation to their removal.

(4.) *As to the consideration* [1]—*words of conveyance—and parcels.*

Considera-

Care must be taken in preparing the deed to state truly

(n) *Young v. Raincock*, 7 C. B. 310.

(o) *Stronghill v. Buck*, 15 L. T. 22, Q. B.; 14 Jur. 741.

(p) 8 Ves. 431.

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[1] Though a consideration is in general essential to every deed, a gift or voluntary conveyance will be valid as between the parties, and can only be questioned in certain cases when the rights of creditors and sub-

the consideration paid by the purchaser, and upon which *ad valorem* duty will have to be paid; as the omission to

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tion—to be truly stated.

sequent purchasers are concerned. In the State of New-York, every conveyance of any estate or interest in lands, made with intent to defraud prior or subsequent purchasers, for a valuable consideration, are void as against them, unless they had actual or legal notice of the fraud at the time of the purchase; and even then, the conveyance is void as against such purchaser, if the grantee in the voluntary conveyance, or the person to be benefitted by it, was privy to the fraud. N. Y. R. S. vol. 2, p. 134. And every conveyance, with a power of revocation or alteration reserved to the grantor, is equally fraudulent and void, as against such purchasers. Furthermore, it is a misdemeanor to be a party or privy to any conveyance or assignment of any interest in lands, goods, or things in action, or any rents or profits issuing therefrom, or to any charge in any such estate or interest with intent to defraud prior or subsequent purchasers, or to delay, hinder, or defraud creditors. 2 N. Y. R. S. 690, sec. 3. But no conveyance is to be deemed fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration. *Ib.* vol. 2, p. 137, sec. 4. And it seems that a *bona fide* purchaser, for valuable consideration is protected, whether he purchases from a fraudulent grantor or a fraudulent grantee; and that there is no difference, in this respect, between a deed to defraud subsequent creditors, and one to defraud subsequent purchasers. *Anderson v. Roberts*, 18 Johns. Rep. 515. *Bridge v. Eggleston*, 14 Mass. Rep. 245; *Been v. Smith*, 2 Mason, 252; *Somes v. Brower*, 2 Pick. 184; *Martin v. Cowles*, 1 Dev. & Bat. 29; *Violett v. Violett*, 2 Dana, 324; *Price v. Jenkin*, 4 Watt's Rep. 85.

At common law, a deed was valid without consideration, whether it were a conveyance of land or a contract for the payment of money; for, being made with deliberation, the will of the party alone was regarded as consideration sufficient. So a feoffment was valid without consideration; or if any was implied it was the feudal duty or service resulting to the grantor. And in Massachusetts and Maine, it seems a deed may be construed as a feoffment where the intent so requires. *Marshall v. Fish*, 6 Mass. Rep. 24; *Emery v. Chase*, 5 Greenl. 232; *Green v. Thomas*, 2 Fairf. 321.

Where the consideration of a deed is paid to a third person by direction of the grantor, this is equivalent to a payment to the grantor himself. And even a subsequent assent to this form of payment has been held to have the same effect. *Lithgow v. Kavenagh*, 9 Mass. 177; 7 Gill & John. 661-7.

The consideration is of two kinds—good or valuable. Money is the most common valuable consideration; but it may consist in marriage also, which is regarded in law, in the light of a pecuniary advancement. A good consideration is commonly the affection which a man has for his children or relatives, and his desire to promote their interest. Equity considers the relation of parent and child as the foundation of a moral obligation, and the latter as a creditor of the former. Payment of a debt is sometimes classed as a good consideration. 2 Hilliard on Real Property, 275.

do so, although it will not affect the sufficiency of the stamp or the validity of the deed,(q) will expose the parties

(q) Tilsley on Stamps, 1st ed. 250.

Where a deed is made in consideration of "natural love and affection," and the further consideration of "one dollar," parol proof may be admitted of other valuable considerations. *Harvey v. Alexander*, 1 Randolph, 219. A wife's parting with her dower right in real property, forms a sufficient consideration for a subsequent deed conveying other property for her benefit. *Ib.* The parties to a deed are estopped from denying the consideration stated in it. But it seems another auxiliary consideration may be proved. *Powell v. Monson & Brimfield Man. Co.*, 3 Mason, 347. "One dollar" consideration in a deed of trust, though sufficient against grantor as against creditors, is looked on as nominal only. *Ward v. Trotter*, 3 Monroe, 3. But sufficiency of consideration will not avail when the intention is fraudulent and unlawful, for it is this which vitiates the deed. *Ib.* *Russell's heirs v. Russell*, 4 Dana, 42. Although personal property acquired by marriage, cannot be considered a valuable consideration to support a subsequent deed for the benefit of the wife, yet it is a meritorious consideration, and the deed will be supported or set aside, according to circumstances. *Harvey v. Alexander*, 1 Randolph, 219. In order to make a valid conveyance of land under the statute of uses, it is sufficient if any good consideration appears upon the face of the deed. *Bank United States v. Housman*, 6 Paige, 526. A deed without any consideration at its execution, may be supported by parol proof of a subsequent valuable consideration. *Banks v. Brown et al.*, 2 Hill, 563. The relationship between the parties is sufficient to uphold a deed made "in consideration of love and affection," from a husband and his wife to the husband of her sister. *Blakenby v. Hatton et al.*, 3 Dana, 521. A deed which purports to have been made and executed for divers good and valuable causes and considerations, and also in consideration of the sum of ten dollars, lawful money of the United States, to the grantor of the land, paid by the grantee, is legally operative as a deed of bargain and sale. *Maccubbin v. Cromwell*, 7 Gill & Johns. 157. The liability of a grantee, as a surety for the grantor, is a good consideration to support an absolute conveyance of land against a creditor of the grantor. *Buffum v. Green*, 5 N. H. Rep. 71. The acknowledgment of consideration in a deed is no estoppel. The true consideration may be proved by parol. *Hickman v. McCurdy*, 6 J. J. Marsh. Rep. 555. The actual payment of the nominal consideration expressed in a deed, is not necessary to the validity of such deed. It is sufficient if it is stated in the deed to have been paid, as the consideration thereof. *Meriam v. Harsen*, 2 Barb. Ch. Rep. 232. As between the parties to a conveyance, where a mere nominal consideration is expressed in such conveyance for the purpose of supporting it, a court ought not to allow proof to be given of the non-payment of any consideration in order to destroy the deed. *Ib.* [Vide 6 Paige's Rep. 526; Shep. Touch. 222.] An acknowledgment in a deed of conveyance, that the consideration money has been paid, cannot be contradicted for the purpose of defeating the conveyance, but for any other purpose, it may be contradicted like



who prepare the deed to severe penalties, and the vendor to an action by the purchaser for the return of the unexpressed consideration ;(r) where fixtures, standing \*timber, or any other parts of the inheritance are taken at a valuation, its amount must be included in the consideration ; but moveable chattels which pass by delivery may be handed over, and receipts may be given for them and for their price ; if, however, they be for any reason assigned by deed, the *ad valorem* duty attaches, and their price must be stated ; and it would appear from a recent case that the recital in a deed of such sale and delivery (which has been very frequent in practice) renders the duty payable, unless the articles are of such a kind as would come under the description of goods, wares, or merchandize.(s) Upon the purchase of an equity of redemption the mortgage debt is subject to duty, and its existence must therefore appear upon the face of the deed :(t) where freeholds or leaseholds are purchased together with copyholds, at an entire price, it is necessary, for the purposes of the stamp act,(u) to apportion the price between the copyholds and the other property ;(t) and this may be done so as to reduce the duty to a minimum, without any regard to the actual relative value of the estates ; so, where estates are purchased by two or more at an entire sum, and the purchasers take separate conveyances, or where estates of different tenures or held under different titles are purchased at an entire sum, but are conveyed to the purchaser separately by separate instruments, the purchase-money may,

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Duty payable on fixtures, timber, &c.

As to chattels passing by delivery.

Recital of sale—its effect.

Apportionment of consideration on purchase of copyholds and other property.

(r) See 48 Geo. III. c. 149, ss. 22 to 26 ; 55 Geo. III. c. 184, s. 8 ; *Gingell v. Purkins*, 19 L. J., N. S. Exch. 129. See also 13 and 14 Vict. c. 97, s. 10, remitting penalties incurred prior to the 20th March, 1850, in respect to the omission from leases of the compensation paid by the lessee to the party who held the original agreement for the lease ; see *Att.-Gen. v. Brown*, 3 Exch. 662.

(s) *Harsfall v. Hey*, 2 Exch. 778.

(t) 55 Geo. III. c. 184, Sched. title "Conveyance."

(u) Inasmuch as the duty upon the copyholds is charged on the surrender.

any other receipt. *Pritchard v. Brown*, 4 N. H. Rep. 397. (See American Ch. Digest, by Waterman, vol. 2, p. 4.)

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[\*256]

Sale in con-  
sideration of  
transfer of  
stock or  
grant of  
annuity.

for the purpose of diminishing the duty, be apportioned on the face of the conveyances without regard to the actual value of the estate, or (in the case of there being several \*purchasers) to the pecuniary arrangements between the parties: but under the new scale of duties only a very trifling saving can be thus effected.

And where before the 11th October, 1850,(w) the consideration was the actual transfer of a sum of stock, or the grant of an annuity or rent-charge of uncertain duration, as no *ad valorem* duty was payable, no penal liability was incurred by omitting to state, or by misstating the consideration: and this seems to be still the case as respects the grant of the annuity or rent-charge; but under the late act, where the consideration consists wholly or in part of any stock or security, the value thereof is to be considered as purchase-money, and to be stated in the conveyance; and is to be ascertained as follows, viz., in the case of stock in any of the public funds, or any Government debenture or stock of the Bank of England or Bank of Ireland, or any debenture or stock of any corporation, company, society, or persons or person, payable only at the will of the debtor, according to the average selling price thereof respectively, on the day or on either of the ten days preceding the date of the conveyance, or if no sale shall have taken place within such ten days then according to the average selling price thereof on the day of the last preceding sale; and in the case of a mortgage, judgment, or bond, or a debenture, the amount whereof shall be recoverable by the holder, or any other security whatsoever, whether payable in money or otherwise, then according to the sum due thereon for both principal and interest.(x)

Compensation in-  
[\*257]

In the case of a conveyance under the Lands Clauses \*Consolidation Act, or any Act of Parliament containing

(w) This date should be inserted, *supra*, p. 109, instead of 10th Oct.

(x) Schedule to 13 & 14 Vict. c. 97; *quare*, whether either this or the general Stamp Act provides for the case of a conveyance in satisfaction of a simple-contract debt already *bona fide* due to the purchaser? See, however, *Gingell v. Purkins*, 19 L. J. N. S. Exch. 129. As to the amount of duty, see next Chapter.

similar provisions, care should, of course, be taken, that the sum expressed to be paid as the consideration for the purchase of land, does not include money paid merely by way of compensation for damage to adjacent property; as, the latter amount is not subject to duty.

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ney on sale  
to Railway  
Company.

Except in the case of a feoffment (a mode of conveyance which is seldom adopted except on sales by a corporation) it has become unusual to insert the operative words of conveyance in the past as well as in the present tense.(y)

Operative  
words used  
only in pre-  
sent tense.

The reference to the statute which rendered a lease for a year unnecessary, although still of frequent occurrence, is rendered useless by the subsequent enactment, that all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be held to lie in grant as well as in livery.(z)

Reference  
to Act dis-  
pensing  
with lease  
for year un-  
necessary.

It is still the general practice, even when the purchaser has no wife to whom he was married before the late dower act came into operation, to convey the estate, if freehold \*of inheritance, to the ordinary uses to bar dower, in order to avoid the necessity, on future sales, of proving the non-existence of any such wife; where, however, the

Dower uses  
— whether  
to be in-  
serted.

[\*258]

(y) Freehold lands in possession in the Australian Colonies are, it is understood, generally conveyed by feoffment. As to real property in the East Indies, see *Freeman v. Fairlie*, 1 Moore's Ind. App. 305; and *Gardiner v. Fell*, 1 J. & W. 22. Except in Calcutta, and those localities where land has been acquired and subsequently sold by the Indian Government, there does not appear to be any real estate which can be considered as held in fee simple; the ordinary English conveyances are, however, generally adopted in transactions between Europeans; of course, in preparing in England a conveyance of land in India, treated as freehold, the recent acts would not enable the draftsman to dispense with a lease for a year; as to the forms of conveyance in the North American Colonies, and West India Islands, see appendix to Burton's Compendium, and 2 Jarm. Conv. by S. 398 *et seq.* Our courts will apply the general law of this country (being abstractedly just, and not exclusively founded on any peculiar or technical rule) to questions relating to land in a colony where a different system of jurisprudence prevails, unless it is shown or suggested that the laws of the colony are different on the point in question: *Bentinck v. Willink*, 2 H.L. 1. As to the assurance of customary freeholds, see the late case of *Graham v. Jackson*, 6 Q. B. 811, and authorities there cited.

As to forms  
of convey-  
ance in the  
Colonies.

(c) 8 & 9 Vict. c. 106, s. 2.

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Parcels  
how to be  
described.

draftsman is aware that no such wife exists, it seems to be sufficient to recite the fact; the purchaser himself should, if practicable, be the releasee or feoffee to uses.

In describing the parcels, a description by reference to a schedule, or to a schedule and map, has become as usual as it is convenient. (a) It has been held that the steward of a manor may insist upon a surrender containing a substantive description of the tenements, and may object to a mere reference to the description in a former surrender. (b)

Mines, &c.,  
if pur-  
chased by  
Railway or  
Waterworks  
Company  
must be  
specified.

In a conveyance to a Railway or Waterworks Company, if within the provisions of the recent consolidation acts, care must be taken to specify the mines and minerals, if intended to be included; for, unless actually specified, they will not pass. (c)

#### (5.) *As to the covenants.*[1]

Covenants  
for title.

The covenants for title are that part of the draft upon which disputes and questions of difficulty most frequent-

(a) See, as to the effect of a variance between a schedule to a conveyance and an indorsed map, *Llewellyn v. Earl of Jersey*, 11 M. & W. 183; and, as to the schedule and map restricting the description in the body of the deed, *Barton v. Daves*, 19 L. J. 302. See, too, the 1st Report of the present Registration Commissioners, recommending maps as the basis of a General Register.

(b) *The Queen Lord of the Manor of Bishop's Stoke*, 8 Dowl. P. C. 608.

(c) See 8 & 9 Vict. c. 20, s. 77; 10 & 11 Vict. c. 17, s. 18.

[1] A covenant may be defined an agreement or obligation, by deed, to do, or abstain from some act. It is said a covenant differs from a defeasance, in that the latter provides for its own execution, or terminates in itself, while a covenant is something to be performed by the party covenanting. But a covenant may engage that something has been already done. And a covenant of this description, may in certain cases, operate *prospectively*. Hence, if an officer selling real estate on execution covenants that his proceedings have been according to law, a subsequent neglect to return the execution, is a breach of such covenant. Hilliard on Real Property, vol. 2, p. 363.

In New York, no covenants can be implied in any conveyance of real estate whether such conveyance contain special covenants or not. N. Y. R. S. vol. 1, 738, sec. 140.

The usual personal covenants inserted in a conveyance of the fee are 1. That the grantor is lawfully seized; 2. That he has good right to

ly arise; they are of considerable, although, perhaps, to a purchaser, of rather over-estimated importance to the

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convey; 3. That the land is free from incumbrances; 4. That the grantee shall quietly enjoy; 5. That the grantor will warrant and defend the title against all lawful claims. The covenant of seizin, and of a right to convey, and that the land is free from incumbrances, are personal covenants, not running with the land, or passing to the assignee; for if not true there is a breach of them as soon as the deed is executed, and they become *choses in action* which are not technically assignable. But the covenant of warranty, and the covenant for quiet enjoyment are prospective, and an actual ouster or eviction is necessary to constitute a breach of them. They are consequently in the nature of real covenants, and they run with the land conveyed, and descend to heirs, and vest in assignees or the purchaser. The general covenant that the grantor will warrant and defend the title is also a personal covenant, binding on the personal representatives of the covenantor. To make a covenant run with the land, there must be a subsisting priority of estate, between the covenanting parties. A covenant to pay rent or to produce title deeds, or for renewal, are covenants running with the land. All covenants concerning title run with the land, with the exception of those that are broken before the land passes. 4 Kent, 470, 471, 472, 473.

"In Pennsylvania, Delaware, Illinois, Indiana, Missouri, Mississippi, and Alabama, it is declared by statute that the words, grant, bargain and sell in a conveyance in fee, shall, unless specially restrained, amount to a covenant that the grantor was seized of an estate in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment as against his acts. But in Pennsylvania, in the case of *Granty v. Ewalk*, 2 Binney's Rep. 95, it was adjudged that those words in the statute of 1715, and the decision will equally apply to the same statutory language in the other states, did not amount to a general warranty, but merely to a covenant that the grantor had not done any act, nor created any incumbrance, whereby the estate might be defeated. Upon this construction, the words of the statute, are divested of all dangerous tendency; and they amount to no more than did the provision in the English statute of 6 Anne, c. 35, sec. 30, upon the same words. It may not be very inconvenient that those granting words, should imply a covenant against the secret acts of the grantor; but beyond that point, there is great danger of imposition, upon the ignorant and the unwary, if any covenant be implied that it is not stipulated in clear and precise terms. In New York it was decided in the case of *Frost v. Raymond*, 2 Caines' Rep. 188 and proved, by an examination of the authorities, that the words, "grant, bargain, sell, alien, and confirm" did not imply a covenant of title in a conveyance in fee; though the word "grant," or the word "demise," would imply a covenant of title, in a lease for years. The word "give," it was also shown, in that case, would amount to an implied warranty during the life of the feoffor. But this doctrine, though deemed sound and applicable in those states which continue to be governed on this point, by the common law has ceased to have any operation in New York under the provision in the Revised Statutes. In North Carolina, and Alabama, the words "give,

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respect  
thereof.

[\*259]

What cove-  
nants entered  
into by abso-  
lute benefi-  
cial owner.What usual  
covenants  
by, may be  
omitted.

solicitor they are important, inasmuch as he will be responsible to his client for permitting him unknowingly to enter into improper covenants ;(d) or for not securing to him those to which he is entitled from the other party.

\*A vendor, if the absolute beneficial owner, enters into the usual covenants that he has good right to appoint and release, assign, or surrender (as the case may be, according as the estate is freehold, leasehold, or copyhold,) for quiet enjoyment, free from incumbrances, and for further assurance.(e)[1]

It is usual to insert in a conveyance by appointment a covenant that the power was well created and is subsisting ; and in an assignment of leaseholds, a covenant that the lease was a valid demise and that the term is subsisting ; but these covenants are, in effect, comprised in the

(d) *Stannard v. Ullithorne*, 10 Bing. 491.

(e) See *Church v. Brown*, 15 Ves. 263, 264.

"grant, bargain, and sell," &c. do not imply any warranty of title ; and this is the conclusion which sound policy would dictate. To imply covenants of warranty from the granting words in a deed is making those words operate, very often, as a trap to the unwary." 4 Kent's Com. 473, 474.

The effect of the covenants in a deed, is to give the grantee a claim for pecuniary damages in case of any defect in the title. The covenants of seisin, a right to convey, &c. are broken by the mere existence of an adverse title. But the covenants of warranty, and for quiet enjoyment, are not broken until the adverse title is actually enforced by entry or acknowledgment of title. Hilliard on Real Property, vol. 2, p. 392.

[1] If, says Lord Eldon, a man covenants to sell a fee simple estate free from all incumbrances, and says no more, it is clear that covenant carries in *gremio*, and in the bosom of it, the right to proper covenants. Why ? Because that sort of engagement has, in all times, been carried into execution, in a form and mode which alter most materially, substantially, and importantly, the effect of the mere conveyance. If no more is done than the agreement imports, the conveyance contains express covenants. It is perfectly settled, by the law, what are the covenants as applied to the case of a vendor who was himself a purchaser for valuable consideration ; and though the agreement, if literally executed, would carry all the extensive obligations to which the legal warranties flowing from the words, would bind the vendor and his heirs, yet it cannot be carried into execution, without express covenants, substituted for and limiting the implied covenants. In such a case, the law would determine what are usual covenants. See 2 Sug. on Vend. p. 301.

covenants for right to appoint and for right to assign ; and consequently are often omitted : the vendor of leaseholds also covenants that the rent has been paid up to the last day of payment, and that all other the lessee's covenants have been performed up to the date of the assignment. Chap. XII.

The covenants of such a vendor, if he have acquired the estate by purchase for money or other valuable consideration, are extended to the acts of himself (*f*) and parties claiming under him : [2] it is conceived, that marriage is for this, as it is for other purposes, a valuable consideration, even as in favor of collaterals ; (*g*) but, in practice, it is usual for a vendor claiming under a marriage settlement to covenant against the acts of the settlor and his representatives. (*h*)

To whose  
acts his  
covenants  
extend.

It appears to have been formerly held that a Court of Difference  
between

(*f*) Sug. 702.

(*g*) *Davenport v. Bishopp*, 1 Ph. 698.

(*h*) 9 Jarm. Conv. by S. 375.

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[2] This, Mr. Fearne remarks, is a practice founded in reason, where the vendee obtains the full benefit of all the covenants in the conveyance to the vendor, to the same extent as his vendor has them, by obtaining the possession of the deeds containing those covenants. When the vendor has parted with his means of claim or remedy, against his grantor, for breach of his covenants, and transferred them to the purchaser, by delivery of the deeds, and such vendee comes into the vendor's place, in that respect, by the acquisition of such deeds, it would be unreasonable that the vendor should make himself liable for any such breach. He, by departing with the means of remedy or compensation, must be understood to have discharged himself from, and the vendee, by accepting those means, to have taken upon himself the peril or risk of such breach, and the duty of enforcing its remedy or compensation. Mr. Fearne, however, thought, that where a vendor retains the title deeds, he is bound to enter into covenants extending to the acts of the persons against whose acts he is indemnified by the deeds in his possession : but he also thought these covenants should be qualified by the insertion of a covenant on the part of the purchaser, that in case any claim should be made under the vendor's covenants against the acts of the former owner, and he (the vendor) should produce the deeds, in order to enable the purchaser to avail himself of the covenants contained in them, then, no advantage should be taken of the vendor's covenants. But this is a distinction never attended to in practice. If a vendor is entitled to retain the deeds, he enters into the usual covenant for the production of them, but never enters into more extensive covenants for the title, on account of the retention of the deeds. See 2 Sug. on Vend. p. 301, 302.

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practice of  
Conveyan-  
cers and rule  
of the Court.

[\*260]

Owner cove-  
nants, on  
sale by  
Court or by  
Trustees.

As to land-  
owners'  
covenants on  
sale to  
Railway  
Company.

Chancery would not compel a vendor to enter into covenants extending back further than the acts of the last owner; (i) but where such owner himself acquired the estate otherwise than by purchase, the "universal and settled practice of conveyancers" (k) is, to make the covenants extend to the acts of all prior owners up to and inclusive of the last purchaser: and the courts would probably at the present day be inclined to sanction such practice by decision. [1]

The owner of an estate sold by order of the court, or by his own trustee for sale, enters into the same covenants as if he himself were selling. (l)

It appears to be the general notion that landowners agreeing to sell land to railway and other similar companies must enter into the usual covenants for title; the liability can hardly be questioned in respect of land which the company has no power to take compulsorily; such as land required for extraordinary purposes; (m) but as re-

(i) *Lloyd v. Griffith*, 3 Atk. 268.

(k) Sug. 704.

(l) Sug. 703.

(m) 8 and 9 Vict. c. 18, ss. 12 and 13.

[1] Where a vendor does not claim by purchase in the confined acceptation of that word; that is, by way of bargain and sale, for money, or some other valuable consideration, a purchaser is entitled to require covenants from such vendor, extending to the acts of the last purchaser. For instance, if I sell an estate which was devised to me, and the deviser's father purchased the estate, the covenants for title are extended to the acts of the father. And a person claiming under a voluntary conveyance, is considered in the same light as a devisee. So a person whose estate is sold under an order of a court of equity, or by a trustee to whom he has conveyed it, upon trust to sell, is bound to covenant for the title, in the same manner as he must have done, if he himself had sold the estate. But although the practice of conveyancers is, to extend covenant for the title to the acts of the last purchaser, yet the Court of Chancery appears to hold, that a person not claiming by purchase, is only bound to covenant against his own acts, and those of the person immediately preceding him. No solid reason however can be given, why any line should be drawn, and the covenants should extend to the person only, who immediately preceded the vendor; and however the Court of Chancery may act upon this rule the practice of the profession, which has established a reasonable rule, has taken too deep a root, to be easily extirpated. See 2 Sug. on Vend. 302.



spects land which the company has power to take compulsorily, the landowner's contract, although apparently voluntary, is scarcely so in fact; and his liability to enter into covenants may be considered doubtful in principle, and not supported by any satisfactory authority; for in "*Re the London Bridge Act*,"<sup>(n)</sup> there was the important fact—although not noticed in the judgment—of the enabling act having been obtained by the vendors pursuant to an agreement with the purchaser: it is, however, believed to be the general practice for such owners to covenant; and the practice would probably, if necessary, be supported by decision. As respects landowners who have entered into no agreement, but as against whom the entire proceedings of the company have been compulsory, it is conceived that they are not bound, and do not in ordinary practice consent, to enter into any covenant.<sup>(o)</sup>

It has been recently decided by Sir L. Shadwell, V. C., that the first and second tenants for life of a settled estate, selling under a private act of Parliament which they themselves, \*pursuant to an agreement with the purchaser, had obtained for the purpose, were bound to enter into the usual covenants for title; the court assuming that upon a sale under a power with the consent of the tenant for life his obligation so to covenant was a matter of course.<sup>(p)</sup>

Liability of  
tenants for  
life to  
covenant.

[\*261]

In the above case the statutory vendors were tenants for life under a will, and the covenants for title were extended to acts of their testator; the question, whether they were properly so extended, does not appear to have been much considered; and it is submitted, that, although a tenant for life or other owner of a particular estate may be required so to covenant in respect of his own beneficial interest, yet that, as respects the reversion, (in which he has *no* beneficial interest) his covenants should be confined to the acts of himself and parties claiming under him; considering the present frequency of such sales the point is one of some practical importance.

To whose  
acts their  
covenants  
should  
extend.

(n) Cited *infra*.

(o) Frend. & Ware's Rail. Conv. 136.

(p) *Re London Bridge Acts*, 13 Sim. 176, 179.

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Covenants  
on sale, by  
husband  
and wife, of  
wife's estate.

Upon a sale, by husband and wife, of the wife's unsettled freehold or copyhold estate, the husband, since he either does or may receive the purchase-money, covenants for title as upon the sale of his own estate : and if there be any doubt as to the fact of marriage, the woman should herself enter into usual covenants, and it is submitted that a purchaser might require their introduction.

Vendors,  
who are not  
beneficial  
owners, co-  
venant only  
against in-  
cumbances.

As a general rule, fiduciary vendors only covenant that they have done no act to prevent their selling, or to incumber the property ;(q) a covenant for further assurance would seem to be a reasonable addition, and is often attempted to be introduced ; but it is settled that trustees cannot, as defendants, be compelled to enter into it :(r) it has, however, been held, that the heir at law and assignees \*in bankruptcy of an intended lessor are bound, to the extent of their interests in the property, to enter into special covenants which the intended lessor had contracted to enter into ;(s) and the decision would apparently apply to the case of an agreement for sale and for special covenants by the vendor : the cases seem to show, that where mere trustees, &c., have themselves entered into the contract, or where the contract of the party whom they represent is sought to be enforced against them, the rule against their entering into any covenants other than the covenant against incumbrances, &c., is invariable ; but that it is not settled whether, if they themselves come into equity to enforce the contract of the party whom they represent, they must not covenant for further assurance.

[\*262]

Rule, whether  
universal.

Incumbran-  
cer releasing.

An incumbrancer who releases the estate, whether voluntarily or in consideration of payment, only covenants that he has done no act to encumber.

Crown gives  
no cove-  
nants.

A purchaser from the Crown can require no covenants for title.(t)

Covenants  
by parties  
interested  
in purchase-  
money.

Upon a sale by trustees under a will, for general purposes, or by order of the court, the purchaser is not entitled to any covenant but that against incumbrances ; ex-

(q) 11 Ves. 345 ; *Staines v. Morris*, 1 V. & B. 8.

(r) *Worley v. Frampton*, 5 Ha. 560.

(s) *Page v. Broom*, 3 Beav. 36.

(t) Sug. 705.

cept (in the case of a will) where the purposes to which the purchase-money is primarily applicable have since been satisfied, so that the substantial owners are in fact ascertainable; in practice, however, it is usual in any case to insert covenants by the parties who are beneficially entitled in any considerable amount to the residue of the purchase-money.(v)[1]

Any covenant intended to provide for a defect in title which appears on the face of the conveyance, should be so expressed; if the defect can be kept off the face of the

Covenant  
against  
known  
defect.

(v) Sug. 704 *et seq.*

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[1] A purchaser is not entitled to any covenants for the title, where an estate is sold by trustees under a will, because no line can well be drawn, as to the *quantum* which would make a person liable to covenant; and therefore if this rule were not settled a person who only took a small amount, might as well be required to covenant, as one who took a large sum. See *Granland v. Wight*, 5 Munf. Rep. 295. The same rule applies *ex necessitate* where an estate is sold for similar purposes, under an order of a court of equity. If a different rule prevailed, the consequence would be that the estate could never be sold by decree, until an account was taken of all the debts; because, before that account was taken, it could not appear who were to join in the conveyance, what was the number, and in what proportions they were beneficially entitled. In both these cases, therefore, the purchaser is only *entitled* to a covenant from the parties conveying that they have done no act to incumber. But, in practice, all the *cestui que trust*, whose shares of the purchase-money are in any wise considerable, join in covenants for the title, according to their respective interest. The rule of equity on this subject may, of course, be altered by the agreement of the parties; and Sugden suggests that in all agreements for purchase of estates from devisees, &c. in trust to sell, the purchaser should stipulate that such of the persons entitled to the purchase-money, as he may require, shall join in the usual covenants for title. Where, however, the trust is to pay debts, or trifling legacies, which will exhaust the whole of the purchase-money, it is obvious that such a stipulation could not be carried into effect, and it had therefore better be omitted. It is, however, by no means settled, that *cestuis que trust* of money to be produced by the sale of estates devised to trustees to sell, cannot, in any instance, be required to covenant for the title. Where the money to arise by sale of the estate, is absolutely given to two or more persons, they are, substantially, owners of the estate, and must, accordingly, covenant for the title. So even where the money is, in the first place, to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title. See 2 Sug. on Vend. p. 302, 303.

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\*conveyance (which is generally the case) the covenant should be entered into by a separate instrument,(w) which should refer to the defect; or there should be an agreement signed by the covenanter admitting the existence of the defect, and stating that the same is intended to be included in the covenant.(x)

Covenant for  
production  
of deeds.

So, a covenant for production of title deeds, if it extend to documents not noticed in the conveyance, should, as a general rule, be entered into by a separate deed; the question to be considered is, whether any document covenanted to be produced is of such a character as to make it desirable that it should, so soon as practicable, be taken off the title.

Purchaser's  
right to.

A purchaser is entitled to a valid covenant for the production, and probably for the right to take copies,(y) of such documents of title as are not delivered over to him :(z)[1] commencing with such as are necessary to show a marketable title,(a) and excepting such copies of court roll and inrolled deeds, (if inrolled under any act which makes the inrolment evidence,) as are not in the possession or power of the vendor;(b) in the absence of agreement, he is not bound,(c) (except upon a sale by assignees of a bankrupt,(d) and, perhaps, cannot be advised to assent to the introduction of the ordinary proviso for determining the vendor's liability upon his selling the residue of the property and procuring a substituted covenant to be entered into by the person who will, upon such sale, become the holder of the deeds; but on a sale by

(w) Sug. 702.

(x) *Vide infra*, Ch. XIV.

(y) Sug. 479.

(z) *Barclay v. Raine*, 1 Sim. & Stu. 449.

(a) *Dare v. Tucker*, 6 Ves. 460; *Cooper v. Emery*, 1 Ph. 398.

(b) *S. C.*

(c) Sug. 478.

(d) *Ex parte Stuart*, 2 Rose, 215, L. C.; where the court stated, generally, that the assignees' covenant should be confined to the time of their continuance as assignees.

[1] As such a covenant might lead to inconvenience, it would be better not to require it, but to limit the price to be paid for the copies, which should be the mere cost, for the seller is not to make a profit by the covenant.

fiduciary \*vendors it is usual to insert such a proviso,(e) and its insertion should be stipulated for on their behalf.

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But the right to a covenant for production is, as a general rule, confined to those documents which affirmatively evidence the vendor's title,(f) and does not extend to those which are required to negative mere possibilities; it appears, in fact, to have been decided by Sir *L. Shadwell*, V. C.,(g) that a purchaser from an heir at law, whose ancestor left a will not affecting the property, can require no covenant for its production; this decision seems, however, to conflict in principle with that in a case,(h) where a purchaser from an heir under similar circumstances, was, upon selling again, held bound to produce the will if in existence for the inspection of the sub-purchasers.

To what documents it extends.

In order that the covenants for production may run with the land in respect of which the deeds are retained, it is necessary that the covenantor should be seised of the legal estate in such land :(i) this, however, is a point not often attended to; and if a purchaser has a right to insist upon it, such right would seem to involve the additional right of requiring the title to such other land; a purchaser, it is conceived, could scarcely be advised to press the point.

The vendor's covenants, if the estate be freehold, should be entered into with the grantee, releasee, or feoffee to uses (if any :) if the estate be copyhold, it appears to be the preferable practice, instead of taking a covenant to surrender with covenants for title and production in the same deed, to let the surrender precede the execution of the deed containing the covenant for title and production; \*as, if the former course be adopted, it is not clear that the covenants will run with the bond.(k)

With whom vendor's covenants should be entered into.

[\*265]

On the other hand the vendor may, in certain cases, Purchaser's

(e) 5 Dav. Conv. 595.

(f) Including, of course, deeds of covenant for production entered into by prior vendors; Sug. 478.

(g) *Cooper v. Emery*, cited in *Hayes on Conv.* 573, 3rd ed.

(h) *Stevens v. Guppy*, 2 Sim. & Stu. 439.

(i) Sug. 479, 731; even then, the result is not free from doubt; *vide infra*, Ch. XIV.

(k) 3 Dav. Conv. 306; 9 Jarm. Conv. by S. 188.

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covenants  
with vendor.

require covenants on his own account, for it may be laid down as a general rule, that whenever he is personally subject to liabilities, either in respect of the estate, or for the performance of which the estate stands as a security, the purchaser, in taking the estate, must undertake the liabilities, and covenant to indemnify the vendor against them.

On purchase  
of equity of  
redemption,

For instance, on the sale of an equity of redemption the purchaser must covenant to pay the mortgage debt and future interest.<sup>(l)</sup>

or leaseholds

So, on the sale of leaseholds, either by the original lessee or by an assignee who has entered into a similar covenant with a prior owner, the purchaser must covenant to pay the rent and perform the covenants contained in the lease, and to indemnify the vendor against the same.<sup>(m)</sup>[1]

(l) *Ibid.*

(m) *Staines v. Morris*, 1 V. & B. 8; and see *Close v. Wilberforce*, 1 Beav. 112; *Cochrane v. Robinson*, 11 Sim. 378.

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[1] It has been held that a purchaser of a leasehold estate must covenant with the vendor to indemnify him against the rent and covenants in the lease, although he is not expressly required to do so by the conditions of sale; and it will not vary the case that he is not entitled to any covenants for title; for example, where the sale is by an executor of an assignee; but as assignees of a bankrupt selling a lease which was vested in him, cannot require the purchaser to enter into such a covenant for their indemnity, or the indemnity of the bankrupt. And although a purchaser is not required, by the conditions of sale, to give an indemnity against the rent and covenants, and an assignment is actually executed without any indemnity being given; yet, even a verbal agreement by the purchaser, before the sale, to secure such indemnity, will be carried into a specific execution, if it be distinctly proved. Where a vendor is only an assignee of the leasehold estate, and is not bound by covenant to pay the rent, and perform the covenants in the lease, his liability to do so ceases upon his assigning the estate over, and consequently, in such case, there is not anything for a purchaser to indemnify against. It has been decided that the assignee is liable to indemnify the lessee who assigned to him, against breaches during the time he (the assignee) is in possession, although he has not covenanted to indemnify the lessee, but not further. See 1 Sug. on Vend. p. 47, and authorities.

So, although a purchaser of an equity of redemption enter into no obligation, with the party from whom he purchases, to indemnify him from the mortgage money, yet equity, if he receives the possession and has the profits, would, independently of contract, raise upon his conscience an

The same rule would, it is conceived, apply to the sale of freehold land subject to quit-rent which the vendor is under a personal liability to pay: so, where a vendor of freeholds had, on his own purchase, covenanted to observe the covenants entered into by a former owner, and which prohibited building upon the land, he was held to be entitled to a similar covenant from a purchaser who bought with notice of the restriction, and filed a bill for specific performance.<sup>(n)</sup>

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or freeholds subject to quit rents, or covenants for or upon which vend- or is liable.

Upon the same principle, when the vendor has covenanted with a former purchaser for the production of the deeds, a purchaser of the residue of the estate, if he take \*the deed must covenant for their production to the first purchaser.<sup>(o)</sup>

For produc- tion of deeds.

[\*266]

Where the contract for sale was that the conveyance should be made subject to certain specified stipulations as to the mode of building upon the land, and also to "a covenant on the part of the purchaser, his heirs and assigns, and proper provisions for securing the due observance and performance thereof," it was held that the conveyance should contain, not only the covenant, but also a power for the vendor or his representatives to enter and remove any buildings erected in breach of such covenant,

Agreement against using land in specified manner: performance of, how to be secured in conveyance.

(n) *Mozhay v. Inderwick*, 1 De G. & S. 708.

(o) *Vide infra*, ch. xiii., p. 314.

obligation to indemnify the vendor against the personal obligation to pay the mortgage money; for, having become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage. But where the mortgage was secured upon the estate sold, and also by a surety, and, upon the sale, the purchaser covenanted with the seller and his surety, to pay the money, and to indemnify the seller and his security from the payment of it, it was held that the surety, having been compelled to pay, could not recover in an action of assumpsit against the purchaser, but his only remedy was by an action by the seller upon the covenant. It was considered that it might have been otherwise, if there had been a mere conveyance without any covenant, for then the purchaser would have been the seller's substitute, and the surety would have been the surety of the purchaser. *Crafts v. Tritton*, 8 Taunt. 365; 2 Moo. 411. And if a purchaser who has not obtained a conveyance sell to another, the second purchaser is, without entering into a covenant, bound to indemnify him against any costs incurred in proceedings for his benefit. See 1 Sug. on Vend. 226.

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and to retain possession until payment of the consequent expenses; but that he was not entitled to have a term for years, or a rent charge, limited to a trustee by way of security for the performance of the covenant.(p)

Vendor of minerals, entitled to power to enter and ascertain state of workings.

Under an agreement to purchase the minerals under a given surface, the price to be payable by instalments, and the payments to be accelerated if more than a given quantity of minerals be gotten from time to time, the vendor is entitled to a covenant in the conveyance, reserving to him a right of entry for the purpose of ascertaining the state of the workings.(q)

Purchaser in consideration of annuity, covenants for payment.

Under an agreement to purchase land in consideration of a life annuity, "to be charged on the land," the vendor is entitled to, not only the charge, but also, the purchaser's covenant for payment.(r)

Purchaser when bound in equity by covenants, although he do not execute.

And a purchaser who accepts the benefit of the conveyance, will be bound in equity by the covenants on his part therein contained, although he do not execute it.(s)

[\*267]

Alterations in draft should be communicated.

\*(6.) *As to the draft and engrossment.*

When the draft has been approved, any alteration made in it should be communicated to the other party before engrossment;(t) where the alterations merely consist in omissions of passages introduced by such other party, or can otherwise be easily pointed out, it is submitted, that the opposite solicitor (who must be presumed to have retained a copy of the draft) would not be entitled to a general re-perusal; this is a question which sometimes arises in those exceptive cases where the purchaser has to pay the vendor's expenses.

Engrossment—

The engrossment is made by and at the expense of the purchaser; the ordinary practice, as to the position of the indorsed receipt and attestation clauses, should be adhered to; as a departure therefrom may give rise to questions with future purchasers.(u)

(p) *Ex parte Ralph*, 1 De Gex, 219; see the form given, p. 228.

(q) *Blakesley v. Whieldon*, 1 Ha. 176.

(r) *Bower v. Cooper*, 2 Ha. 408.

(s) *Willson v. Leonard*, 3 Beav. 373.

(t) 1 V. & B. 15.

(u) *Kennedy v. Green*, 3 Myl. & K. 699.



The engrossment is the property of the purchaser; when executed the vendor has a lien upon it for unpaid purchase-money,<sup>(w)</sup> but his attorney has no lien on it for costs.<sup>(x)</sup>

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belongs to  
purchaser.

Where the engrossment was executed by the vendors, but the purchase went off in consequence of other material parties refusing to execute, and the vendors made no claim to it as a deed, the purchaser was held entitled at law to recover it from their attorney, they being allowed to cancel it;<sup>(y)</sup>[1] this decision, however, as observed by

Executed  
and then  
the contract  
rescinded.

(w) Sug. 694.

(x) *Oxenham v. Esdaile*, 2 Y. & J. 493.

(y) *Esdaile v. Oxenham*, 3 B. & C. 225.

[1] In the case here cited, the conveyance has been executed by the sellers, and remained in the custody of an attorney of theirs, to whom it was delivered by a servant of the sellers, (without any particular direction as to what was to be done with it,) who had given it to the servant, in order that it might be sent back, but there were still two other parties to execute, who refused to do so, and the purchaser gave up the contract and received back part of the money which he had paid in respect of the purchase; the purchaser was held entitled to recover the deed from the attorney as a piece of parchment, by two judges against one. They considered that the property in deed was in the purchaser before the execution of the seller, to all intents and purposes, and that he had not lost the property by the execution of it by the sellers, who had no right to execute it, unless the other parties consented. But they thought that if the question were to be considered with reference to the document in the character of a deed, particularly if the sellers had opposed the delivering of it up, there might be considerable difficulty, and they did not decide that the deed might not be cancelled, but the purchaser they thought, was, at all events, entitled to have the deed restored to him in a cancelled state, and that being so, the attorney's unqualified refusal to restore it, was a wrongful conversion by him. And although cancellation would not divest the estate, if it passed, yet the deed might be treated by a jury, as an escrow, and the sellers would, at all events, have been bound to give it up, on the execution of a re-conveyance to them, at their own expense; they could not retain the deed altogether. Mr. Justice Littledale entertained considerable doubts whether the plaintiff had made out a title to the instrument, either as a deed or a parchment. He thought the plaintiff had no right to it as a deed, and, as a piece of stamped parchment, it seemed to him that when the purchaser delivered it to the seller's attorney, to procure the execution by them, he lost that legal property which would enable him to maintain trover. The deed was partially executed, and he thought that until all parties consented to rescind the contract, the deed would not revert to the state of mere pieces of parchment, and again become the property of the purchaser in that character. If he had possession of the

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Sir *E. Sugden*, "depended upon the instrument having been imperfectly executed, and upon the sellers not interposing to claim any interest in it :"(z) and where the \*deed has been executed so as to vest the legal estate in the purchaser, there would seem to be a difficulty in holding that he could claim to retain it upon the contract going off, even although he were willing to execute a reconveyance.

(z) Sug. 695.

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deed, he might perhaps be enabled to bring an ejectment, and the judge considered that the attorney (the defendant) had not any right to cancel the deed. "Of course" says Sugden, (2 Sug. on Ven. p. 293,) "a purchaser, who has delivered his conveyance to the seller to be executed by him, so far qualifies his right of property in the deed, that if it be executed, the seller has a right to retain it until the purchase-money is paid or tendered; for the stamped parchment becomes, by its execution, a deed, and as such, would vest the estate in the purchaser, and the possession of the deed would enable him to recover the estate. The decision in *Esdaile v. Oxenham*, depended upon the instrument having been imperfectly executed, and upon the sellers not interposing to claim any interest in it; and the contract having been rescinded, what might have been a deed, was treated as a spoiled parchment. The Court in this view, it appears, made an order, in substance, that the deed should be delivered to the purchaser, giving to the sellers, the right to cancel it, but cancelled, or uncanceled, it was to be delivered to the purchaser.

## \*CHAPTER XIII.

AS TO MATTERS RELATING TO THE COMPLETION OF  
THE PURCHASE.

1. *The execution of the conveyance:—by married women, &c.—conveyance of trust estates under the Trustee Act, 1850.*

2. *As to the discharge of incumbrances.*

3. *As to purchaser's liability to see to application of purchase-money.*

4. *As to the amount payable in respect of purchase-money—how increased or diminished.*

5. *To whom and how the purchase-money should be paid.*

6. *As to purchaser's right to deeds, attested copies, &c.*

7. *As to matters necessary to insure the full effect of executed conveyance;—registration, inrolment, &c.*

8. *As to stamps.*

9. *As to costs.*

(1.) THE vendor must, if practicable, in person convey,<sup>(a)</sup> or, as respects copyholds, surrender<sup>(b)</sup> the property; the purchaser need not rely upon a power of attorney: and any assurance of a married woman's interest in real estate, executed under a power of attorney, seems to be inoperative.<sup>(c)</sup>[1]

<sup>a</sup>  
Vendor must convey in person.

Where, on the sale of freeholds, a married woman joins in respect of her estate or interest not settled to her separate appointment or use, her acknowledgment of the deed \*under the 3 & 4 Will. IV. c. 74, is an essential part of

Conveyance of freeholds by married woman must be acknowledged under 3 & 4 Will. IV. c. 74.

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(a) 2 Ves. 681.

(b) *Mitchel v. Neale*, 2 Ves. 679; *Noel v. Weston*, 6 Mad. 50.

(c) *Graham v. Jackson*, 6 Q. B. 811.

[1] The execution of the wife's deed must be her own personal act; if it be signed with her name, by the husband, though in her presence, and by her direction, it is not a compliance with those statutes which require deeds to be subscribed by the grantor's own hand. And she cannot convey by attorney. *Linsley v. Brown*, 13 Conn. Rep. 192; *Sumner v. Co-nant*, 10 Verm. Rep. 9.

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the conveyance;(d) and the purchase money should not be paid until such acknowledgment be perfected.[1]

(d) *Billing v. Webb*, 1 De G. & S. 716; *Lassence v. Tierney*, 1 Mac. & G. 572.

[1] At common law, the conveyance of a *feme covert*, except by some matter of record, was absolutely void, and in England the wife used to pass her freehold estate by a fine, and this, and a common recovery were the only ways in which she could convey her real estate. Now the English law is changed, as to the mode of conveyance of the wife, by the abolition of fines and recoveries, and the wife conveys by deed with her husband's concurrence. By stat. 3 and 4 Will. 4, c. 74, for abolishing fines and recoveries, and substituting more simple modes of assurance, provision is made for the alienation by married women by deed. It is enacted that after the 31st of December, 1833, it shall be lawful for every married woman, in every case, except that of being tenant in tail, by deed, to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and, also, to dispose of, release, surrender, or extinguish any power which may be vested in, or limited, or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do, if she were a *feme sole*; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed, by which the same shall be effected, nor unless the deed be acknowledged by her, as thereafter directed: and it is provided that the powers of disposition given to a married woman by the act, shall not interfere with any other powers. In case the husband is a lunatic, or otherwise incapacitated, the court of common pleas is empowered to dispense with the husband's concurrence, except where the Lord Chancellor, or other persons entrusted with lunatics, or the court of chancery shall be the protector of a settlement, in lieu of the husband. 2 Kent, 150; 2 Greenl. Cruise, 23, 24.

"The conveyance of lands by *femes covert* under the government of the colony of New York, was in point of fact, by deed, and not by fine, and upon the simple acknowledgment of the wife before a competent officer, without private examination. Such loose modes of conveyance were mentioned in the act of the 16th of February, 1771, and were confirmed; but it was declared that in future, no estate of a *feme covert* should pass by deed, without her previous private acknowledgment before the officer apart from her husband, that she executed the deed freely, without any fear or compulsion of her husband. The deeds of *femes covert*, in the form used in other cases, accompanied by such an examination, and which is still required by statute, have ever since been held sufficient to convey their estates, or any future contingent interest in real property, and fines and recoveries are now abolished by statute in New York. If the wife resides out of the state, she may unite with her husband, and convey all her right and interest, present and contingent, equally as if she were a *feme sole*, and without any such special acknowledgment.

The acknowledgment is to be made before one of the judges of the superior Courts at Westminster, or a Master

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Acknowledgment by

Nor does a deed by the wife in execution of a power or trust, require a private examination. The substitute in favor of a conveyance by the wife, of a deed for a fine or common recovery, was made in Maryland by the colony statutes of 1715, 1752 and 1766; and the statute law of that state is explicit that the husband and wife must join in the conveyance. So in Massachusetts, from the earliest periods of the colony, the wife with the concurrence of her husband, could convey her estate in fee, by deed duly acknowledged and recorded. In New Jersey, by their early colony lands, the wife might convey her estate by deed, provided she was previously and privately examined by a magistrate. In South Carolina, Georgia, and Kentucky, the wife conveys in the same way, and in Rhode Island, Connecticut, Ohio, Indiana, Missouri, and North Carolina, (and this is, no doubt, the general rule,) the husband must join in the conveyance by the wife, and she must be separately examined before an officer." 2 Kent, 151, 152, 153.

It seems that in Maine, New Hampshire, Massachusetts, and Connecticut, the wife's acknowledgment of a deed before a magistrate, in the common form is sufficient; but that in nearly or quite all the other states, it is necessary that she be separately and privately examined. In Virginia, it has been held that the private examination, or something equivalent, is necessary to pass merely equitable rights. It has been sometimes held that the wife's conveyance may be effectual, although some statutory requisitions, merely formal, are not complied with. Hence, in Ohio, where the magistrate's certificate stated only the substance of the transaction, this was held sufficient. And a statute of Pennsylvania declares valid all deeds made prior to September 1, 1836, though the certificate be defective. A similar statute exists in South Carolina. But substantial deviations from the form prescribed will render the deed invalid. Thus, where a statute requires the wife to renounce her right to lands, in the manner required in the case of dower, and to renounce all her estate, interest and *inheritance*; a renunciation of all her *interest and estate*, and also, *all her right and claim of dower*, will not pass her land. So in case of a conveyance by a husband, in his own name, of his wife's land, she merely signing and sealing the deed, "in token of her relinquishment of all her right in the bargained premises;" held, her interest did not pass, and, after his death, she might maintain a writ of entry for the land, on her own seisin. And no amendment will be allowed in the defective acknowledgment of a wife upon parol evidence. Upon the same principle, a usage or statute authorizing a married woman to convey her land, being a departure from the common law, will be limited strictly to an actual transfer of the property. Thus a mere agreement made by her to convey, though made for valuable consideration, and with consent of the husband, is void even in chancery. A statute of Delaware provides that the wife shall be bound by no warranty, except a special warranty against herself, her heirs, and those claiming under her; and a statute of Kentucky, that the wife's deed shall not pass her estate, but "shall be as effectual for every other

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whom to be  
taken.

in Chancery, or two of the perpetual Commissioners appointed under the Act,<sup>(e)</sup> or—where by reason of resi-

(e) Sect. 79.

purpose, as if she were unmarried." See Hilliard on Real Property, vol. 1, p. 122, 123.

In Illinois, if the examining magistrate does not personally know the woman, her identity must be proved by one witness. In Missouri, the identity is to be proved by two witnesses. The execution of the deed must be the wife's own personal act; if it be signed with her name, by the husband, though in her presence, and by her direction it is not a compliance with the statutes requiring deeds to be subscribed by the grantor's own hand. And she cannot convey by attorney. The certificate of the magistrate must show that in her examination the requirements of the statute were substantially pursued; and in the absence of fraud, no parol proof is admissible either to qualify it, or to supply its defects or omission. But in the absence of proof to the contrary, it will be presumed that the magistrate, in conducting the examination, did his duty, in making her acquainted with the contents of the deed. See note to Greenl. Cruise, vol. 2, p. 24.

In Michigan, Vermont, Massachusetts, New Hampshire, and Maine, provision is made by which the wife, if deserted by the husband, without being left by him with the means of support, may be authorized by the courts to sell her real estate, and in several other respects to act as a *feme sole*. In Massachusetts and Michigan this power may also be given, if he is sentenced to the state prison. In Maine, it may be given, if he is *confined* there. In New Hampshire it may be given, if the desertion has continued for three months; or if she has good cause of divorce against him; or if any cause exists which, by lapse of time, may ripen into just ground of divorce. In Main and Massachusetts, a married woman coming into the state to reside, her husband never having lived with her in the state, may make valid conveyances, and do other acts as a *feme sole*. And the principle is now generally, if not universally established in the United States as a necessary exception to the rule of the common law disabling a *feme covert* to contract or sue alone, that where the husband was never within the state, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make contracts, and sue and be sued as a *feme sole*. The same principle, it is presumed, will enable her to convey her own real estate where no other provision has been made by statute. But to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation, form, and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm. Ib.

dence beyond seas, or ill health, or any other sufficient cause, the married woman shall be prevented from so ac- Chap. XIII.

The following decisions relative to the transferring of the wife's estate by deed, comprise the American law on the subject:—

The deed of a *feme covert*, to be valid, must be executed by her and her husband. *Seaton v. Pickering*, 3 Randolph, 468; *Thompson v. Peeble's heirs*, 6 Dana, 391. There must be a privy examination to pass the title of a *feme covert* obligee, in a conveyance bond. *Steele v. Lewis*, 1 Monroe, 49. A *feme covert* must relinquish her equitable as well as legal right separately and apart from her husband. *Couns v. Geiger*, 1 Call, 190. A deed of a married woman to a guardian of her infant husband is looked upon with jealousy, and the court will require a personal examination of the wife to know if it be done without coercion. *Ferris v. Brush*, 1 Edw. 572. A different rule seems to have been established in Tennessee; the court there held, that a court of chancery has no jurisdiction to inquire into the regularity of a privy examination of a *feme covert*, to a deed executed by her. *Campbell v. Taul*, 3 Yerger, 548. The wife's equity in land may be conveyed by her and her husband during coverture, by privy examination, and recording the deed in the proper office. *Whitaker v. Blair*, 3 J. J. Marsh. 241. A conveyance by a *feme covert* with warranty, although acknowledged according to the statute, will not operate by way of estoppel, so as to pass to her grantee, her subsequently acquired interest in the property conveyed. *Teal v. Woodworth*, 3 Paige, 470. The deed of a *feme covert* will pass no interest in her land except in her separate estate, unless her privy acknowledgment is recorded in proper time. *Whitaker v. Blair*, 3 J. J. Marsh. 241; *Hepburn v. Dubois' lessee*, 12 Peters, 345. So also in South Carolina: where a *feme covert* joins her husband in a conveyance, and renounces her inheritance according to the act of 1795, the renunciation is not complete and legal until recorded; and if it has not been recorded within the time prescribed by the registry act, it is absolutely void. *Hillegas v. Hartly*, 1 Hill, 110. A deed from a husband and wife without her privy examination and relinquishment, is utterly void as to her; and furnishes no consideration to support a subsequent conveyance. *Harvey v. Pecks*, 1 Munf. 518. And if a *feme covert* be privily examined, her covenant for further assurance in a deed is obligatory, and a specific execution will be decreed. *Nelson v. Harwood*, 3 Call, 384. The act of Maryland, directing the acknowledgment of the wife as grantor in a deed, is prescribed for her benefit, and a literal compliance with the specified form, has never been required. *Young v. The State*, 7 Gill & Johns. 263. A deed of husband and wife, where the privy examination of the wife is taken before the acknowledgment of both, is void. *Gilchrist v. Buie*, 1 Dev. & Batt. 359. A deed of a *feme covert*, to be valid, must be executed by the husband also. But if it appears, by sufficient evidence, that the deed was executed by a *feme covert*, it would be completely valid as to her, if it appears by the testimony of even a single witness, that it has been executed by the husband also. *Seaton v. Pickering*, 3 Randolph, 468. There must be a privy examination to pass the title of a *feme covert* obligee in a conveyance bond. *Roberts' heirs v. Elliott's heirs*, 3 Monroe, 397. A conveyance by a *feme covert* with warranty, although acknowledged

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(f) Sect. 83. .

according to the statute, will not operate by way of estoppel, so as to pass to her grantee her subsequently acquired interest in the property conveyed. *Teal v. Woodworth*, 3 Paige, 470. The fee simple interest of a *feme covert*, in lands belonging to her in descent, cannot be taken from her and vested in another person, without her previous assent thereto, given upon private examination before a competent authority to make such examination. *Lasseter v. Turner*, 1 Yerger, 413. A deed of lands, executed by a *feme covert*, together with her husband, but not acknowledged by her, pursuant to the statute, conveying lands belonging to the *feme*, and the payment of the consideration money by the grantee, is not such an agreement to convey as will be enforced against the heirs at law of the *feme*, by a decree for specific performance. *Martin v. Dwelly*, 6 Wend. 9. In Kentucky, a deed executed by a *feme covert* who is examined privately, by the clerk out of court, is sufficient to pass her estate. *Pendergast v. Gwaltney*, 2 A. K. Marsh. 67. A *feme covert*, in consideration of a creditor of her husband giving him further time to pay his debt, executed a deed jointly with her husband, in form a mortgage, of real estate, to secure its payment. This deed was not acknowledged according to the acts of assembly in relation to conveyances of land by *feme covert* grantors; nor did it purport to be in execution of a power reserved to her; but being for property in fact held for her separate use, which he had a right to convey as a *feme sole*, was considered in equity as creating a specific lien; and enforced accordingly. *Brundige v. Poor*, 2 Gill & Johns. 1. A certificate of a privy examination of a *feme covert* to a conveyance of real estate, by husband and wife, states that the *feme* made her acknowledgment of the conveyance of the land, freely and voluntarily; and that she was willing that the same should be recorded, without stating that she had willingly signed and sealed the deed; and without stating that if it was shown and explained to her by the commissioners: held, if the *feme* had, in fact, signed the deed, such certificate of privy examination is substantially a compliance with the requisitions of the statute, and good; and the *feme* is bound by the deed. But if she had not signed the deed, such acknowledgment, so certified, is not sufficient to make the deed binding on her, within the requisition of the statute. *Tbd v. Baylor*, 4 Leigh, 498. A voluntary conveyance of her property made by a woman after a marriage contract, and before the marriage, which conveyance is intentionally concealed by the parties to it from the intended husband, is fraudulent in equity as to him, and will be set aside. *Tucker v. Andrews*, 1 Shepley, 124. It is the settled practice of a court of equity to direct a proper provision for the wife whenever her property becomes the subject of jurisdiction. *Id.* When a *feme covert* is empowered, by deed, to dispose of property by deed of gift or will, it can be disposed of in no other way; and a disposition of it by bill of sale, is void. *Marshall v. Stephens*, 8 Hump. Tenn. Rep. 159. A conveyance by a husband of the wife's real estate to a third person, for the purpose of having the same



commission had issued to persons supposed to be near a particular locality up the country in India, and, in consequence of their removal, the acknowledgment was taken before strangers, the Court, under the special circumstances, allowed the commission to be amended by inserting their names :(*g*) when the christian name of the woman was unknown, a commission issued with the name in blank ; but the court observed, that more than ordinary care must be taken to verify the party by affidavit.(*h*)

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Special Commissioners appointed, *nunc pro tunc*.

The person or persons taking the acknowledgment must sign a memorandum and certificate,(*i*) in the forms prescribed by the 84th section of the Act ; the certificate, with an affidavit(*k*) verifying the same, is then to be filed in the Common Pleas ; and thereupon the deed will, as respects the married woman, take effect from the time of acknowledgment ;(*l*) when the certificate and affidavit are \*inconsistent with each other, the court will not allow them to be filed ;(*m*) and therefore, of course, will not permit a certificate to be so amended as to make it vary from or alter the sense of the affidavit.(*n*)

Certificate of acknowledgment to be made, verified and filed.

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The general rules published by the Court of Common Pleas in Hilary term, 1834, provide that in case of an acknowledgment before commissioners, one, at least, of such commissioners shall be a person who is not interested in the transaction, or concerned therein as attorney, solicitor,

General rules of Hilary term. 1834.

(*g*) *In re Stubbs*, 5 Sc. N. R. 327.

(*h*) *In re Apperton or Atherton*, 1 C. B. 447 ; 3 Dow. & L. 26.

(*i*) A description of the woman in the certificate, as " Mary the reputed wife of A. B., otherwise Mary S., spinster," has been held to be sufficient ; *Ex parte Francis*, 5 C. B. 498.

(*k*) Which may be on either paper or parchment : *Ex parte Carr*, 5 C. B. 496 ; see *In re Foster*, 7 C. B. 124.

(*l*) Sects. 85 and 86.

(*m*) *In re Dixon*, 4 C. B. 631.

(*n*) *In re Millard*, 5 C. B. 753 ; *Ex parte Witty*, 9 Dow. P. C. 838 ; see, as to interlineations, &c., in the affidavit, *In re Worthington*, 5 C. B. 511 ; *In re Fagan*, *ibid.* 436.

conveyed to the husband, and thus transferring the estate to him, will be sustained where no fraud has been practiced upon the wife. *Shepperson v. Shepperson*, 2 Gratt. Va. Rep. 501. See American Chancery Digest, by Waterman, vol. 2, p. 348, 349, 350.

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Separate examination of married woman.

or agent, or clerk to any attorney, solicitor, or agent so interested or concerned : and the commissioners are to inquire of the married woman, separately from her husband and from the attorney or solicitor employed in the transaction, whether any provision is to be made for her in lieu of the interest which she gives up ;(o) and, if so, are to satisfy themselves before taking the acknowledgment that such provision has been made by some deed or writing produced to them, or, if not made, then they are to require its terms to be reduced into writing, and verify the same by their signatures ; and the affidavit(p) (which may be made by one of the commissioners, although he be the solicitor employed in the transaction),(q) is to be in the form annexed to such general rules.

Acknowledgment in consideration of money paid to married woman, allowed  
[\*272]

The court will allow the acknowledgment to be taken in consideration of a sum of money actually paid to the married woman, if the sum so paid be too small (e. g., 40*l.*) to form the subject of a settlement :(r) and the \*usual inquiry as to a provision is unnecessary on a compulsory sale to a public company.(s)

As to the affidavit where acknowledgment is taken abroad.

When an acknowledgment is taken abroad, the court will not dispense with an affidavit of verification sworn and authenticated according to the local law, unless it be distinctly shown that great inconvenience would result from a strict adherence to the ordinary rule :(t) upon this principle, the court has received an affidavit sworn before a British consul, upon evidence either that he was, according to the *Lex loci*, competent to administer an oath,(u) or that there was no local authority within reach

(o) See, as to taking an acknowledgment from a deaf and dumb woman, *In re Harper*, 6 Man. & G. 732.

(p) The affidavit must speak positively to the fact of her having attained majority : *In re Coverley*, 8 Scott, 147.

(q) *In re Scholefield*, 3 Scott, 657.

(r) *Ex parte Webber*, 5 C. B. 179.

(s) *In re Foster*, 7 C. B. 120.

(t) *In re Crawford*, 4 C. B. 626 ; and see *In re Eady*, 6 Dow. P. C. 615 ; *In re Pearsall*, 9 Dow. P. C. 46 ; *Ex parte Shaw*, *ibid.* 839 ; *In re Schiff*, 1 Dow. & L. 911 ; *Ex parte Way*, *ibid.* 950 ; *In re Street*, 2 C. B. 364.

(u) *In re Barber*, 4 Dow. P. C. 640, does not seem to be an authority for the general power of a consul, see *Ex parte Hutchinson*, 5 C. B. 499.

who possessed such a power : (v) so, also, it has received, under similar circumstances, affidavits sworn before the "provisional British consul at the Society Isles," (w) the "minister of the British chapel at Moscow," (x) and a "political agent up the country in India ;" (y) but has refused to receive an affidavit sworn before the British minister at Florence, it not appearing that there was no local authority competent to take the affidavit. (z)

Upon a sale of copyholds, a surrender to the use of the purchaser, by the copyholder's wife, with his consent, after she has been privately examined, will bar her right to free-bench, if any exist by special custom ; although, at the date of the surrender, the purchaser has no legal estate in the premises. (a) Upon the sale of her copyhold property, if she have the legal estate, the conveyance must be by "surrender : if her estate be merely equitable, a surrender by her and her husband, after she has been privately examined, is binding as if her estate were legal ; (b) or her equitable estate will pass by a mere deed acknowledged under the act. (c)

So, also, an acknowledged deed will pass a married woman's reversionary interest in the proceeds of sale of real estate subject to a trust for sale but remaining unsold ; (d) or in money subject to an absolute trust for investment in land. (e)

We have seen that an assignment, merely by the husband, of her legal terms for years, is sufficient ; but that, as respects her equitable chattels real, it is prudent to require that she shall join in and acknowledge the assignment : (f) and when the husband purports to convey, for

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Mode of assuring married woman's interest in copyholds.

[\*273]

Acknowledged deed will pass her reversionary interest in proceeds of sale of real estate, or in money subject to be invested in real estate.

As to her terms for years

(v) *Davy v. Maltwood*, 2 Man. & G. 424 ; *Ex parte Daly*, 9 Dow. P. C. 380.

(w) *In re Darling*, 2 C. B. 347.

(x) *In re Pickersgill*, 6 Man. & G. 250.

(y) *In re Studds*, 5 Scott, N. R. 327.

(z) *In re Dunsany*, 7 C. B. 119.

(a) See *Wood v. Lambirth*, 1 Ph. 8.

(b) 3 and 4 Will. IV. c. 74, s. 90.

(c) Sect. 77.

(d) See *May v. Roper*, 4 Sim. 360 ; 1 Jarm. on Wills, 537, n.

(e) 3 and 4 Will. IV. c. 74, s. 77.

(f) *Supra*, p. 5.

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the continuance of the coverture, his wife's freeholds, a like precaution seems to be requisite if the legal estate be outstanding, or in reversion expectant on a term of years created for a limited purpose.(g)

Concurrence  
of husband,  
when dispensed  
with.

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By the 91st section of the act, it is provided that if a husband shall, in consequence of his being a lunatic, idiot or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause, be incapable of executing a deed or making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon \*the application of the wife, and upon such evidence as to the court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by the act or otherwise ; and all deeds, &c., by the wife, pursuant to such order, are to be executed, &c., by her as if a *feme sole* ; and when executed, &c. shall, but without prejudice to the husband's rights as then existing independently of the act, be as good and valid as they would have been if he had concurred : but the provision is not to extend to cases in which the lord chancellor, or other the persons intrusted with the great seal, or the Court of Chancery, shall be protector of a settlement in lieu of the husband. This clause has been held to extend to copyholds, over-riding the 77th section.(h) The order has been made in cases where the husband, having committed an act of bankruptcy, has absconded and gone abroad, and has not since been heard

(g) *Hanson v. Keating*, 4 Ha. 1 ; *Newenham v. Pemberton*, 1 De G. & S. 644.

(h) *Ex parte Shirley*, 5 Bing. N. C. 226.

of;(i) so, where, although not a lunatic,(j) he was in a Chap. XIII. state of complete imbecility;(k) so, where he was living apart from his wife, and refused to concur in conveying property vested in her as a trustee;(l) or in conveying her own property, unless part of the purchase-money were paid to him:(m) but the court has refused an order in cases of, what appeared to be, his mere temporary absence from the country; as where the wife's affidavit stated that he had gone to New Zealand, and, when last heard of, "was employed in a government vessel, and that she believed that he never intended to return;(n) so, when it stated that the husband, a seaman, had gone abroad, and that she had not heard of him for many years, and believed him dead, no sufficient grounds for such belief being stated.(o)[1]

[\*275]

(i) *Ex parte Gill*, 1 Bing. N. C. 168; *Ex parte Stone*, 9 Dow. P. C. 843; the affidavit must be made by the wife herself; *In re Bruce*, 3 Scott, N. R. 592; 9 Dow. P. C. 840; *Ex parte Williams*, *ibid.* 72.

(j) As to what evidence of existing lunacy is sufficient, see *In re Turner*, 3 C. B. 166.

(k) *In re Woodall*, 3 C. B. 639.

(l) *In re Mirfin*, 4 Man. & G. 655.

(m) *In re Woodcock*, 1 C. B. 437. For form of order enabling a wife to convey her own estate, see *Ex parte Duffill*, 6 Scott, N. R. 30; but the court will not sanction any particular form of conveyance, but will only give a general authority to convey: *In re Woodall*, 3 C. B. 639.

(n) *Ex parte Gilmore*, 3 C. B. 967; and see *In re Smith*, 16 L. J., N. S., C. P. 168.

(o) *Ex parte Taylor*, 7 C. B. 1. Of course the order was applied for as a means of avoiding the necessity of proving the death as a matter of title, and it was eventually made, on further evidence.

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[1] The reason why the husband is required to join with the wife in the conveyance is that his assent may appear upon the face of it, and to show that he was present to protect her from imposition; and the weight of authority, according to Kent, is in favor of the existence of a general rule of law, that the husband must be a party to the conveyance, or release of the wife. But the rule has exceptions. In New Hampshire, the wife may release her right of dower, by her separate deed, executed without her husband. 2 N. H. Rep. 176, 405. It has been held in Massachusetts, that the wife, by her separate deed, executed subsequently to a sale by her husband, and in consideration of that sale, may release her right of dower. *Fowler v. Shearer*, 7 Mass. Rep. 14. And it seems to be the usage, or common law of New England, that a wife, in consideration of her husband's conveyance, may, by her own separate deed, release her

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Married woman may by acknowledged deed convey contingent interests, and may disclaim.

And the disposing power of a married woman under the above act, is, by the 8 & 9 Vict. c. 106, extended to contingent and other similar interests, and to rights of entry; and she is also thereby enabled to disclaim, by deed, executed and acknowledged under the 3 & 4 Will. IV. c. 74, any estate or interest in tenements or hereditaments in England, of any tenure.(p)

As to assignment of Terms for years by Executors or Administrators.

An assignment of leaseholds, or any other chattel interest in real estate, by one of several executors or administrators, is valid :(q) so, also, is an assignment by an executor who dies before probate; but the will must eventually be proved; as the probate copy is the only evidence of the appointment of the executor :(r) but an assignment by a person assuming to act as administrator, and who subsequently obtains letters of administrator, is void.(s)

Power for promoters of Public undertakings in certain cases to convey to themselves upon the refusal or default of the owners.

By the Lands Clauses Consolidation Act, if, upon the deposit in the Bank of the purchase money or compensation agreed or awarded to be paid in respect of lands purchased or taken by the promoters of the undertaking, the owners or statutory owners fail to convey the land upon request, the promoters are authorized to execute a deed-poll, which will have all the effect of a conveyance by the owners or statutory owners :(t) similar powers are also conferred upon the promoters of the undertaking, in the several events of the owners(u) refusing to convey, or failing to make a title, or not being discoverable.(w)

[\*276]

(p) See sections 6 and 7 of the Act.

(q) *Simpson v. Gutteridge*, 1 Madd. 609.

(r) *Brazier v. Hudson*, 8 Sim. 67.

(s) Wms. on Executors, 3rd ed. 312.

(t) See sect. 75.

(u) *Quære* whether this includes Statutory owners. See *Frend and Ware's Rail. Conv.* 83, n.

(w) See sects. 76, 77. See, on the construction of a clause in a private

right of dower to the grantee of her husband. *Rroe v. Hamilton*, 3 Greenl. 63. In New York, if a married woman execute a power by grant, the concurrence of her husband as a party is not requisite, and if she reside out of the state, though she may convey any real estate situated within the state without any other acknowledgment or proof of the execution of it than that required of a *feme sole*, she is in that case to join with her husband in the conveyance. N. Y. R. S., vol. 1, p. 736, sec. 117; *ib.* p. 758, 611. See 2 Kent's Com. 152, 153.

Where a trustee of an outstanding legal estate refuses in a plain case to convey at the request of a party entitled to a conveyance, he will, if a bill be filed against him, be fixed with costs; (x) and where a party has accepted a trust, he cannot, it is conceived, justify his refusal to convey on the ground that no estate is in fact vested in him. A trustee, however, when required to convey the estate on the ground of the trusts having terminated, is entitled to clear and satisfactory evidence of such being the fact. (y) And he cannot be required from time to time to divest himself of different parcels of the trust estate, or to convey by other words and descriptions than those by which the conveyance was made to himself, (z) and the same is the rule in the case of a mortgagee. (z)

Chap. XIII.

Trustees bound to convey at request of cestui qua trust.

But only by the description under which he himself took the estate.

And a mortgagee cannot be compelled to reconvey before the time fixed for redemption, although he be tendered his principal with interest up to that time. (a)

Mortgages not bound to convey before time fixed for redemption.

Where a dormant assignee in bankruptcy had not been consulted as to the sale of part of the estate, and had reasonable cause to doubt whether it would be beneficial, it was held, that he could not be compelled to execute the conveyance, without a previous reference as to the propriety of the sale. (b)

Assignee in Bankruptcy not consulted as to sale, held entitled to a reference as to its propriety.

[\*277]

\*In many cases a conveyance of the legal estate, which could not otherwise have been procured without suit, might, prior to the 1st November, 1850, have been obtained under the provisions of the 1 Will. IV. c. 60, (commonly known as Sir E. Sugden's Act,) the 4 & 5 Will. IV. c. 23, and the 1 & 2 Vict. c. 69. These acts (c) have been repealed, and their principal provisions have been re-enacted, along with considerable additions, by the 13 & 14

Conveyance of legal estates from trustees, &c. formerly procurable 1 Will. IV. c. 60; repealed by "the Trustee Act, 1860."

Act, similar to the 76th section, *Doe v. Manchester, Bury, and Rossendale Railway Company*, 9 Jur. 949.

(x) *Willis v. Hiscox*, 4 Myl. & Cr. 197; *Hampshire v. Bradley*, 2 Coll. 34.

(y) *Holford v. Phipps*, 3 Beav. 434.

(z) *Goodson v. Ellisson*, 3 Russ. 594.

(a) *Brown v. Cole*, 14 Sim. 427.

(b) *Ex parte Underhill*, 3 Mon. & A. 660.

(c) As to the effect of which, see Hill on Trustees, 275, *et seq.*; and Coote on Mortgages, 3rd ed. 359, *et seq.*; and Sug. 225.

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Under which the Court may in the several cases of

a Lunatic or Infant being a trustee or mortgagee;

or of a trustee being out of jurisdiction or not to be found;

or of its being uncertain which of several trustees was the survivor; or of its being uncertain under whether last trustee be living or dead; or of trustee dying without an heir;

[\*278]

or of contingent right being claimable by unborn trustee;

Vict. c. 60, (cited as the Trustee Act, 1850.) By this act, (*d*) the Lord Chancellor sitting in lunacy (as respects matters within that jurisdiction,) the Court of Chancery and the local Courts of Lancaster and Durham (as respects lands within the palatinate jurisdictions, (*e*) are respectively enabled in the several cases of;

A lunatic, or person of unsound mind, or infant, being seised or possessed of any land upon any trust or by way of mortgage, (*f*) or entitled to any contingent right in any lands upon any trust, or by way of mortgage; (*g*)

Or of any person, solely or jointly with any other person or persons, seised or possessed of any lands upon any trust, or entitled to a contingent right in any lands upon any trust, being out of the jurisdiction, or not to be found; (*h*)

Or of its being uncertain which of several persons jointly seised or possessed of any lands upon any trust, was the survivor; (*i*)

Or, (where one or more person or persons shall have been seised or possessed of any lands upon any trust,) of its not be known whether the trustee last known to have been seised or possessed be living or dead; (*k*)

Or of any person seised of any lands upon any trust having died intestate as to such lands without an heir, or having died and its not being known who is his heir or devisee; (*l*)

Or of lands being subject to a contingent right in an unborn person or class of persons, who, upon coming into existence would, in respect thereof, become seised or possessed of such lands upon any trust; (*m*)

(*d*) See sect. 1 for the extended meaning given throughout the Act to the expressions "lands," "seised," "possessed," "contingent right," "convey," "conveyance," "trust," "trustee," "lunatic," "person of unsound mind," "devisee," and "mortgagee."

(*e*) Sect. 21.

(*f*) Sects. 3 and 7.

(*g*) Sects. 4 and 8.

(*h*) Sects. 9 to 12.

(*i*) Sect. 13.

(*k*) Sect. 14.

(*l*) Sect. 15.

(*m*) Sect. 16.



Or of a person jointly or solely seised or possessed of any lands upon any trust, or entitled to a contingent right in any lands upon any trust, being required, by a person entitled to a conveyance, assignment, or release of the same respectively, or his agent, to convey, release, or assign the same, but declining in writing so to do, or refusing or neglecting so to do, for the space of twenty-eight days next after a proper instrument of assurance shall have been tendered to him by any person entitled to require the same, or his agent; (n) to make an order vesting such lands in such person or persons in such manner and for such estate, or releasing the lands subject to such contingent right therefrom, or disposing of the same, as the court shall direct; and the order is in itself to operate as an assurance.

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or of trustee refusing to convey, &amp;c.;

make a vesting or releasing order, which is to operate as an assurance.

And where any mortgagee shall have died without having entered into the possession, or into the receipt of the rents and profits(o) of the mortgaged lands, and the money due in respect of the mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the re-conveyance of \*such lands, the court may make an order vesting such lands in such person or person, in such manner, and for such estate as the court shall direct, in case—

And may, under certain circumstances, make a vesting order in respect of mortgaged lands in cases of

[\*279]

An heir or devisee of such mortgagee shall be out of the jurisdiction, or cannot be found;

heir or devisee being out of jurisdiction or not to be found; or refusing to convey;

Or an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands, or his agent, have stated in writing that he will not convey the same, or shall not convey the same, for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or his agent;

Or it shall be uncertain which of several devisees of such mortgagee was the survivor;

or of survivor of several devisees being unknown; or of its being

Or it shall be uncertain as to the survivor of several

(n) Sects. 17 and 18.

(o) Sect. 19. These words will, it is conceived, materially affect the utility of the clause.

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uncertain  
whether  
heir or sur-  
viving devi-  
see be alive ;  
or of no heir  
or devisee  
existing, or  
being known.

devisees of such mortgagee, or as to the heir of such mortgagee, whether he be living or dead ;

Or such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died, and it shall not be known who is his heir or devisee ;

And the order is itself to have the effect of an assurance.

Court may  
appoint a  
person to  
convey, &c.,  
instead of  
making vest-  
ing order.

And the court may, in every case, instead of making a vesting or releasing order, appoint a person to make a conveyance, assignment, release, or disposition of the lands or contingent interest ; which, when duly made, is to have the effect of a vesting or releasing order.(p)

As to copy-  
holds.

As respects copyhold or customary lands, a vesting order, if made with the consent of the lord or lady of the manor, is sufficient to pass the lands without surrender or admittance ; and where the court appoints a person to convey such lands, such person may do all acts and execute all instruments for the purpose of \*completing the assurance,(q) and which are to be effective accordingly.

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Court may  
declare  
what parties  
are trustees  
of lands  
comprised  
in any suit  
for specific  
perform-  
ance, &c. ;

And where any decree shall be made by any court of equity for the specific performance of a contract concerning any lands, or for the partition or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands, either in cases arising out of the doctrine of election or otherwise, such court may declare that any of the parties to the suit are trustees of such lands, or any part thereof, within the meaning of the act ; or may declare, concerning the interests of unborn persons who might claim under any party to such suit, or under the will or volutary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence would be trustees within the meaning of the act ; and thereupon the estates, rights, and interests of such

(p) Sect. 20.

(q) Sect. 28.

persons, born or unborn, may be dealt with by order under the act. *(r)* Chap. XIII.

And the act enables parties either to go before the master in the first instance, and upon obtaining his certificate of the material facts, and of his opinion that they are entitled to a specified order, to apply by motion for such order; *(s)* or to proceed by petition in the same way as has been customary under the 1 Will. IV. c. 60. *(t)*

parties seeking orders may go at once before the master, or proceed by petition.

And the act provides, *(u)* that whenever an order shall be made for the purpose of conveying or assigning any lands, or of releasing or disposing of any contingent right, and shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction, or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or last surviving devisee of a mortgagee be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any of such cases the fact of an order being made upon such an allegation shall be conclusive evidence of the matter so alleged, in any court of law or equity upon any question as to the legal validity of the order; but this is not to prevent the court from directing a re-conveyance, &c., if the order is shown to have been improperly obtained.

Certain allegations made evidence of facts alleged, if order made thereon.

[\*281]

And a subsequent action *(w)* re-enacts the 3rd and 5th sections of 4 and 5 Will. IV. c. 23, preventing the escheat of property held upon trust or mortgage.

No escheat of trust and mortgage rates.

The words *trust* and *trustee*, as defined in the interpretation clause of the act, would include the case of a

Interests of vendor, how far capable

*(r)* Sect. 30.

*(s)* Sects. 38 and 39: even in the case of lunacy the reference is to a master in chancery. Headlam's Trustee Act, 1850, s. 38.

*(t)* *Ibid.* p. 51, n.; *(o)* see ss. 40, 41 and 42 of Act.

*(u)* Sect. 44: these provisions as to evidence do not seem to apply to orders by the Palatinate Courts.

*(w)* Sect. 46.

## Chap. XIII.

of being  
dealt with  
under act.

vendor who had entered into a valid and subsisting contract for sale, or his representatives; but the 30th section (*x*) seems to show that it is not intended that a vendor's interests shall be dealt with under the act unless there has been a decree for specific performance, or an express declaration of trust.

(2.) *As to the discharge of incumbrances.*

Vendor liable for incumbrances and defects of title until conveyance executed;  
[\*282]

Until the conveyance is executed by all necessary parties, the vendor remains liable in respect of all defects in title: he must, for instance, refund the purchase money, if \*the purchaser having paid it, even although having taken possession, be evicted by an adverse claimant; (*y*)[1] so, if

(*x*) Cited *supra*, p. 280.

(*y*) *Cripps v. Reade*, 6 D. & E. 606; *Johnson v. Johnson*, 3 Bos. & P. 162; Sug. 680.

[1] He will be obliged to do this, although the intended covenants do not extend to the title under which the estate was recovered, and he may have taken possession of the estate. *Cripps v. Reade*, 6 Term Rep. 606.

If the conveyance has been actually executed by all the necessary parties, the vendor's responsibility, under the usual covenants in his deed, is the purchase money with interest; and this is understood to be the general rule throughout the United States. 4 Kent, 477, and cases cited. In Massachusetts, Connecticut and Maine, the purchaser is entitled to the value of the land at the time of eviction, with interest; in Pennsylvania, the price paid with interest from the time of ceasing to receive the profits. *Rickert v. Snyder*, 9 Wend. 416; *King v. Kerr*, 5 Ohio, 156; *Dimmick v. Lockwood*, 10 Wend. 142; *Admr. &c. v. M'Coy*, 3 Ohio, 218; 2 Leigh, 451; *Davis v. Hall*, 2 Bibb, 590; 3 Ohio, 525; *Garrison v. Sandford*, 7 Halst. Rep. 263; *Innes v. Agnew*, 1 Ohio Rep. 389; 8 Pick. Rep. 455; 10 ib. 204; 11 ib. 464; *Curtis v. Dearing*, 3 Fairf. 499; *Ware v. Wetknall*, 2 McCord's Rep. 413; *Seamore v. Harlan*, 3 Dana, 415; *Buckmaster v. Grundy*, 1 Scam. Rep. 312; *Kelly v. Dutch, &c.*, 2 Hill, 105; *Spring v. Chase*, 9 Shepley, 505; *Patterson v. Stewart*, 6 W. & S. 527; *Sterling v. Peet*, 14 Conn. 245; *Norton v. Babcock*, 2 Met. 510; *Brooks v. Moody*, 20 Pick. Rep. 474. In Virginia the question seems to be still left open between the consideration paid, and the value of the land at the time of the warranty.

In Connecticut, where the covenant of seisin is broken by a mortgage upon the land, the measure of damages is the amount of the mortgage. *Gilbert v. Bulkley*, 5 Conn. Rep. 262.

If the eviction be only of a part of the land purchased, the damages to be recovered are a rateable part of the original price; and they are to bear the same ratio to the whole consideration that the value of the land, to

incumbrances be discovered, he must discharge them, or the purchaser himself may pay them off out of the unpaid purchase money (if any):<sup>(z)</sup> but the latter cannot retain any part of it as an indemnity against a contingent charge against which he has agreed to accept the vendor's covenant.<sup>(a)</sup>

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It is conceived that, for the purpose of the above rules, mere execution of the conveyance by a married woman is insufficient, for she has still a *locus pœnitentiæ*; and that, until acknowledgment by her, the vendor's liability to discharge incumbrances, or make good defects in title, continues to subsist; but this liability, it is conceived, does not subsist between acknowledgment and the filing of the certificate.

and (in case of a married woman) acknowledged.

And, in some cases, a purchaser may, even after the

Retention of Incumbrance-

<sup>(z)</sup> Sug. 679.

<sup>(a)</sup> *Vane Lord v. Barnard* (a case of marriage settlement,) Gilb. Eq. R. 6.

which the title has failed, bears to the value of the whole tract; the contract not being rescinded so as to entitle the vendee to recover back the whole consideration money, but only to the amount of the relative value of the part lost. *Morris v. Phelps*, 5 Johns. Rep. 49; *Guthrie v. Pugsley*, 12 Johns. 126; *Dimmick v. Lockwood*, 10 Wend. 142; 4 Kent, 477.

In an action upon the covenant of seisin, the defendant may show that nothing was in fact paid for the particular land in question, or that it was included by mistake. So where the land conveyed consists of two portions, with a separate price for each, he may prove, to reduce the damages, that the title failed to only one portion. So if the grantor had a life estate, the value of such estate may be deducted from the damages. And the defendant may claim allowance for the profits of the land received by the plaintiff, and for which an action is barred by lapse of time. 2 Hilliard on Read Property, 386, 387.

Where a suit is brought in one state upon covenants in a deed of land lying in another, the damages will be assessed according to the law of the former state. *Ib.* 14 Pick. 128, cited.

In Pennsylvania, under the implied covenant arising from the words "grant, &c.," the grantee may recover nominal damages on account of a mortgage upon the land, though not due at the commencement of the suit. If the declaration allege that the land is of less value on account of the mortgage, less saleable, and that it has been sold, by legal process, for a smaller sum, the plaintiff may recover the amount of the mortgage. *Ib.* 11 Serg. & Rawle, 109, cited. See also *Denston v. Morris*, 2 Edw. Ch. Rep. 37; *Tallmade v. Wallis*, 25 Wend. 107; 1 Dana's Rep. 308; 5 Paige's Rep. 300; 21 Wend. 131; 1 Greenl. Rep. 852; 3 Pick. Rep. 452.

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cases out of unpaid purchase money after conveyance executed.

Incumbrances must be paid off or released.

conveyance is executed, retain, out of unpaid purchase money, the amount of incumbrances which then come to his knowledge.(b)

All incumbrances which would affect the property in the hands of the purchaser, must, of course, be released, or paid off by the vendor, or out of the purchase money; and a person, to whom the vendor has, for valuable consideration and without notice of any particular incumbrance, assigned the unpaid purchase money, takes subject to the purchaser's right so to apply the same;(c) we have seen (d) that judgments entered upon against the vendor subsequently to the contract are a lien upon the amount remaining unpaid.

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Implied application of purchase-money by purchaser of equity of redemption in possession.

\*Where a puisne incumbrancer contracted for the purchaser of the estate free from incumbrances, and took possession, but did not pay his purchase money, and afterwards bought in a prior incumbrance, it was held that he must, as in favor of the vendor's representatives, be considered to have applied the purchase money, on the day on which he took possession, towards satisfaction of the incumbrancers, *according to their priorities*.(e)

The 2 & 3 Vict. c. 11, s. 10, in effect authorizes the Commissioners of the Treasury, upon payment of such sums into the exchequer as they may require, or on such other terms as they may think proper, to issue a certificate discharging, as in favor of an actual or intended purchaser or mortgagee and his representatives, the lands, tenements, or hereditaments of a vendor, who is a crown debtor or accountant, from all subsisting and future liability to the crown, except, in the case of leases, in respect of the rents and covenants, &c. ; and, under the 9th section, a *quietus*, when obtained by a crown debtor or accountant, is to be registered at the Common Pleas at Westminster.

Discharge of incumbrances under the L. C. C. Act, 1846.

The Lands Clauses Consolidation Act, 1845, contains clauses which enable promoters of undertakings to dis-

(b) *Vide infra*, ch. XIV.

(c) *Lacey v. Ingle*, 2 Phil. 413.

(d) *Supra*, p. 119 and 233.

(e) *Greenwood v. Taylor*, 14 Sim. 505.

pense with the concurrence of incumbrancers who refuse to receive their money, or to release, or who cannot make out a satisfactory title ;(f) and also provisions applicable to cases where only a portion of the lands subject to the incumbrance is required for the purposes of the undertaking.

(3.) *As to purchaser's liability to see to application of trust purchase money.*

The law as to the liability of a purchaser from trustees to see to the application of his purchase money cannot be considered as settled; the following remarks are made with hesitation, but under the belief that the general principles here attempted to be laid down, will, upon examination, be found to consist with the modern authorities.(g)[1]

As to liability of purchaser from trustees to see to application of purchase-money.

(f) See sect. 108, *et seq.*; and 115 *et seq.*

(g) See an article in the Jurist, vol. 11, part 2, p. 126, advocating conclusions different from those which are here contended for.

[1] Where a trust is raised by deed or will for sale of an estate, a clause that the receipts of the trustees shall be sufficient discharges for the purchase money, is generally inserted and rarely ought to be omitted; because, notwithstanding that a purchaser would, at law, be safe in paying the money to vendors, although trustees, yet equity will, in some cases bind purchasers to see the money applied according to the trust if they be not expressly relieved from that obligation, by the author of the trust. Sug. on Vend. vol. 3, p. 96.

Mr. Butler in his note to Coke on Litt. 290, b. note 1, sec. 12, thinks it questionable whether the admission of the doctrine of making persons paying money to the trustee, with notice of the trust answerable in some cases for the proper application of it to the purposes of the trust, is not, in general productive of more inconvenience than real good; for, although, in many instances, it is of great service to the *cestui que trust*, as it preserves his property from speculation and other disasters, to which if it were left to the mere discretion of the trustee it would necessarily be subject; yet on the other hand it creates great embarrassments to purchasers in many cases; and especially where, as in cases of infancy, the parties in interest are incapable of giving a valid assent to the receipt and application of the purchase money by the trustee. Where there is a devise of real estate for the payment of debts generally, or the testator charges his debts generally upon his real estate, and the money is raised by the trustee, by sale or mortgage, the same rule applies as in cases of personality, that the purchaser or mortgagee is not bound to look to the application of

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Tested by  
intention of  
author of  
the trust,  
as able.

As either  
expressed or  
implied.

It is submitted that, in every case, the question is simply one of intention on the part of the author of the trust; and that the trustees' power to give receipts depends solely upon the degree of confidence which he has, either expressly or impliedly, reposed in them.

This intention may, as before observed, be either expressed or implied; expressed, as where the will or trust-deed contains a clause which in terms empowers the trustees to give valid discharges for the purchase money;

by reason of the general nature of the trust, and the difficulty of seeing to the application of the purchase or mortgage money, without an account of all the debts and assets.

In the case of sales of real estate for the payment of debts generally, the purchaser is not only not bound to look to the application of the purchase money; but if more of the estate is sold than is sufficient for the purposes of the trust, it will not be to his prejudice. And it will not make any difference whether the testator charges both his personal and real estate with payment of his debts, or the real. Nor will it make any difference whether the devise directs a sale of the real estate for the payment of debts, or only charges the real estate therewith; nor that the trust is only to sell, or is a charge for so much as the personal estate is deficient to pay the debts; nor that a specific part of the real estate is devised for a particular purpose, or trust, if the whole real estate is charged with the payment of debts generally by the will.

The rule as above that the purchaser or mortgagee is not bound to look to the application of the purchase money is subject to the exception that if the purchaser or mortgagee is knowingly a party to any breach of trust, by the sale or mortgage, it shall afford him no protection.

Where the trust is for the payment of legacies, or of specified or scheduled debts, the purchaser is bound to see that the money is actually applied in discharge of them. Where the devise is for the payment of debts generally, and also for the payment of legacies, the trust becomes a mixed one; and in such case, the purchaser is not bound to see to the application of the purchase money.

Where the time directed by the devise for a sale of the real estate, is arrived, and the persons entitled to the money are infants, or are unborn, the purchaser is not bound to see to the application of the purchase money, because he might otherwise be implicated by a trust of long duration. But if an estate is charged with a sum of money, payable to an infant at his majority, the purchaser is bound to see the money duly paid, on his arrival at age. Where the trusts are defined, and yet the money is not merely to be paid over to third persons, but is to be applied by the trustees to certain purposes, which require, on their part, time, deliberation and discretion, it seems that the purchaser is not bound to see to the due application of the purchase money. See Story's Eq. Juris. secs. 1130, 1134.



implied, as where the trusts are of such a nature as that a contrary intention cannot reasonably be attributed to the author of the trust. Chap XIII.

And if this intention be expressed, or can be implied, the trustees, upon a sale apparently in pursuance of the trust, have, under all circumstances, a power to give receipts. Of course, it may be shown that the sale is in fact a breach of trust; but then the objection is to the sale itself, and is not a question of application of purchase money. Matters posterior to the creation of the trust neither take away—

And, on the other hand, where this intention is not expressed and cannot be implied, the mere fact that the parties beneficially interested at the time of sale are infants, or unascertained, or any other similar circumstance, will not enable the trustees to give a valid discharge; but the purchaser must see to the application of the money. nor confer a power to give good discharges.

For instance,—(to consider first the question of implied intention, and what sufficiently indicates it,)—where the trust is for payment of debts generally, or for payment of debts generally and of legacies or annuities, the trustees take by implication a power to give discharges; for no purchaser, upon a sale during the existence of debts, could be expected to take an account of them: (h)[1] so, What circumstances attending the trust confer such a power by implication—trusts being for payment of debts;

(h) *Johnson v. Kennett*, 3 Myl. & K. 624; *Eland v. Eland*, 4 M. & C. 420; *Forbes v. Peacock*, 1 Ph. 717; *Page v. Adam*, 4 Beav. 269, 283.

[1] In the case here cited the estate was devised to the son in fee, subject to the debts, an annuity to the widow, and legacies to the daughter. The son also, was entitled to the personal estate. Two or three years after the testator's death, the son and his wife, levied a fine and conveyed the estate without reference to the debts and legacies to uses, to bar dower. The son then sold the estate in lots to several purchasers. The conveyances recited the will, the conveyance and fine, the contract to sell and an agreement to give to the purchasers a bond of indemnity against the legacies. The deeds did not recite that the debts were paid. In some of the deeds, the widow joined and released her annuity *pro tanto*. Each purchaser had a bond of indemnity against the legacies, in which no notice was taken of the debts. The daughters filed a bill against the purchasers, and the assignee of the son. The bill stated that the son had paid the debts, and that the legacies were unpaid. The answers did not deny that the debts had been paid, and stated the belief of the purchasers that the legacies were unpaid. It was held that the estates were still charged with the legacies in the hands of the purchasers, for they dealt

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or in favor  
of unascertained or incompetent  
cestui que  
trust;

["285]

or requiring  
time and  
discretion;

or where money  
is to be  
re-invested.

So, executors  
can give good  
discharges.

where the trust is for payment to a person or persons who may be unascertained, or under age, or subject to any other incapacity or inability to receive the purchase money, and a sale during the existence of such uncertainty, minority, incapacity, or inability, seems contemplated by the author of the trust; for, if the trustees cannot receive the money, there would, upon a sale under such \*circumstances, be no hand to receive it: (i) so, where the money "is to be applied upon trusts which require time and discretion," (k) [1] for no purchaser could be expected to involve himself therein: so, where the money is to be invested, it is sufficient if the purchaser see that this is done, and that a declaration of trust is executed. (l)

So, executors can give good discharges for the purchase-money of chattels real, although specifically bequeath-

(i) *Sowarsby v. Lacy*, 4 Madd. 142; *Lavender v. Stanton*, 6 Madd. 46; *Balfour v. Weeland*, 16 Ves. 151; *Breedon v. Breedon*, 1 Russ. & M. 413.

(k) Sug. 836; citing *Doran v. Willshire*, 3 Sw. 699.

(l) Sug. 838.

with the son, not as a trustee for the widow and daughters, but as the owner of the estate, and they were aware that the legacies were unpaid, and did not represent that they were sold, or supposed that the debts were unpaid. But this decision was reversed upon appeal, upon the ground that the rule applies to the state of things at the death of the testator, and if the debts are afterwards paid, and the legacies alone, are left as a charge, that circumstance does not vary the general rule; and in the particular case, there was no charge in the bill that the purchasers knew, that the debts were paid, and the taking of the bonds of indemnity was held to be unimportant.

[1] This point was decided as far back as 1792, where, in a settlement of real estates with a power of sale, the trustees were to receive the purchase-money and to lay it out again in lands to the uses of the settlement, and till that was done, to invest it in government funds, etc. It was objected that a good title could not be made, as there was no clause that the trustees receipts should be good discharges. The lord chancellor said: "As to the power which the trustees have of giving a discharge, it is true that when land is to be sold, and a particular debt is to be paid with it, the purchaser is bound to see to the application of the purchase-money. But, in cases where the application is to a payment of debts generally, or to a general laying out of the money, he knew of no case which lays down, or any reasoning in any case, which goes the length of saying that a purchaser is so bound; and, therefore he conceived that the receipt of the trustees would be a good discharge in this case."

ed ;(m) for an appointment of an executor, is, in effect, a bequest to him of the personalty in trust to sell for the payment of general debts: and the same rule seems to apply to cases where executors take, either expressly or by implication, a power to sell freeholds or copyholds, and the proceeds of sale are to be applied by them in a mixed fund with the residuary personal estate.(n)

But, on the other hand, where the trusts are for payment of the purchase money, or some definite part of it, to some ascertained person or persons, whose incapacity or inability to receive the same at the time of sale does not appear to be contemplated by the author of the trust, there is no sufficient indication of an intention that the trustees shall give good discharges; and the purchaser is therefore bound to see to the application of the whole or part. (as the case may be) of the purchase-money.

In what cases  
no such power  
is implied

For instance, where the trust (as respects the whole or some definite portion of the purchase-money) is to pay scheduled or specified debts,(o) or legacies only,(p) or to divide it between two or more adults,(q) in all these and similar cases, as nothing seems to be contemplated which \*would impose upon a purchaser any greater hardship than that of paying the whole, or a definite part (as the case may be,) of his purchase-money, to A. the beneficial, rather than to B. the legal owner of the property, no intention can be implied of relieving the purchaser from his *prima facie* obligation of seeing that his money reaches the hand substantially entitled to it.

Where trust  
is for definite  
payments to  
ascertained  
and compe-  
tent parties.

[\*286]

And it appears to be consistent with authority to say, that the power, or want of power, (as the case may be,) to give valid discharges, being dependent upon intention as evidenced in the instrument declaring the trust, is unaffected by any subsequent matter or event.

Subsequent  
events imma-  
terial;

This doctrine is, (it is believed,) generally admitted in cases where the intention is evidenced by an express

in cases  
where power  
to give re-

(m) See Wms. on Executors, 735.

(n) *Tylden v. Hyde*, 2 Sim. & Stu. 238; *Jones v. Price*, 11 Sim. 557.

(o) Sug. 834.

(p) 3 Myl. & K. 630.

(q) 12 Sim. 546.

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ceipts is expressed or implied;

modern authorities.

power to give receipts; and, (it is submitted,) the result cannot be affected by the circumstance of the intention being evidenced by one rather than another set of expressions.

Nor are authorities wanting in support of this view; for instance, where the trusts were for payment of debts, and for other purposes also requiring a sale, the non-existence of debts at the time of sale, although disclosed to the purchaser, has been held immaterial; (r) so, where the trust was to sell and pay the debts of such creditors as should execute the deed within a specified period, it was held that, upon a sale after the expiration of that period, and although the creditors were then ascertained, the receipt of the trustees alone was a good discharge: Sir W. Grant observed, "according to the frame of the deed the purchasers were or were not liable to see to the application of the money; and their liability could not depend upon any subsequent event.(s)[1]

(r) *Page v. Adam*, 4 Beav. 269; *Johnson v. Kennett*, 3 Myl. & K. 624; *Eland v. Eland*, 4 Myl. & Cr. 420; *Forbes v. Peacock*, 1 Ph. 717; and see Rep. note, 722.

(s) *Balfour v. Welland*, 16 Ves. 151, 156.

[1] Sir W. Grant remarked that the deed very clearly conferred an immediate power of sale, for a purpose that could not be immediately defined, viz., to pay debts which could not be ascertained until a future and distant period. It was impossible to contend that the trustees might not have sold the whole property, at any time they thought fit, after the execution of the deed; and yet it could not be ascertained, until the end of eighteen months, who were the persons among whom the produce of the sale was to be distributed. If the sale might take place at a time when the distribution could not possibly be made, it must have been intended that the trustees should, of themselves, be able to give a discharge for the produce; for the money could not be paid to any other person than the trustees. It is not material that the objects of the trust might have been actually ascertained before the sale. The deed must receive its construction, as from the moment of its execution. According to the frame of the deed, the purchasers were or were not liable to see to the application of the money; and their liability could not depend upon any subsequent event. Another ground relied upon in this case was, that the creditors were parties to the deed, and it was clearly intended that the trustees should receive and apply the money. So, where the trust is to lay out the money in the funds, etc., upon trusts, if the purchaser see it invested according to the trust, and procure the trustees to execute a declaration

\*This last decision, it is conceived, goes the full length of the rule contended for; in *Page v. Adam*,<sup>(t)</sup> *Johnson v. Kennet*,<sup>(u)</sup> and *Eland v. Eland*,<sup>(w)</sup> the rule was but partially recognized, inasmuch as (they being cases upon wills) it was only decided that the existence of debts at the death of the testator was sufficient; nor did the judgment even in *Forbes v. Peacock*,<sup>(x)</sup> go any further; in fact, in all these cases, it was sufficient, for the purpose of deciding the question before the court, to hold that the existence of debts at the death would sustain the power; it appears, however, from the reporter's note to the last case, that Lord *Lyndhurst* recognizes what is here contended for as the true principle; viz., that the question is one of construction or intention; and it is, of course, evident that in considering a will upon a question of this nature, it must be held to speak from the date of its execution.

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Remarks on  
*Balfour v.*  
*Welland*.

So, if the trust were for immediate sale, and to divide the proceeds among infants, and a sale were not to take place until some, or even all of the infants attained majority, it is submitted, that the power of the trustees to give receipts would not be affected: the attainment of majority by the infants would be precisely the same, in principle, as the execution of the deed by the creditors in *Balfour v. Welland*;<sup>(y)</sup> until, however, the law is more settled, it would, in such a case, be prudent to obtain, if possible, the concurrence of the adult *cestui que trust*.

Attainment  
of majority  
by infants ces-  
tuis que trust  
immaterial,  
semble.

And, on the other hand, if the intention to confide such a power to the trustees be not evidenced by the instrument creating the trust, subsequent events will not confer it on them; if, for instance, the trust be to sell and divide the proceeds between A. and B., and they so deal with their interests as to vest the beneficial estate in infants, or to

Nor can sub-  
sequent  
events confer  
such a pow-  
er.

(t) 4 Beav. 269.

(u) 3 Myl. & K. 624.

(w) 4 Myl. & Cr. 420.

(x) 1 Ph. 717.

(y) 16 Ves. 151.

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of trust, he is, in practice, considered as discharged from the obligation of seeing to the further application of the money.

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\*make it the subject of contingent rights, so that a valid discharge by themselves or parties claiming under them becomes impracticable, this, it is conceived, would clearly not enlarge the powers of the trustees.

Distinction between the above cases and those in which, if the purposes of the trust being satisfied, the sale is a breach of trust.

But cases where, as in *Forbes v. Peacock*, (z) the trustees have power to sell for several purposes, and notice to the purchaser of the non-existence of that particular purpose, the contemplated existence of which alone indicated an intention to confer a power to give receipts, is held to be immaterial, must be carefully distinguished from cases where a purchaser has notice that the *sole purpose* of the trust is satisfied : in the one case the only question is, whether the trustees can give a good discharge for the money ; and it has been held, and, (it is submitted,) properly held, that the confidence of the author of the trust is to be considered, not as varying, or temporary, but uniform, and co-extensive with the duration of the trust ; but in the other case, *the trust for sale no longer exists* : so that if, in *Forbes v. Peacock*, the payment of debts had been the *only* object for which a sale was authorized, the purchaser, having implied notice that the debts were paid, would have also had notice that the sale itself was a breach of trust. (a) So if, in dealing with an executor, the purchaser know that all the purposes, for the performance of which the law empowers him to sell, have been already answered, (b) or that he is selling for his own private benefit, the sale will be impeachable in equity : (c) so, if a trustee sell to pay his own debts, and the purchaser be aware that such is the case : (d) but the mere fact of a beneficial devisee and \*executor, who has an estate subject to a charge of debts, selling it as his own, is no evi-

Improper sale by executor to purchaser with notice confers no title.

[\*289]

(z) 1 Ph. 717.

(a) 1 Ph. 721 ; *Watkins v. Cheek*, 2 Sim. & St. 199 ; 4 Myl. & Cr. 427. The distinction here suggested does not appear to be recognized in the comments of a learned writer upon *Forbes v. Peacock*, in 11 Jurist, part 2, p. 126.

(b) *Ever v. Corbet*, 2 P. Wms. 148.

(c) Sug. 854 ; Wms. on Executors, 745, *et seq.*, and cases there cited : *Chambers v. Howell*, 12 Jur. 905.

(d) See *Eland v. Eland*, 4 Myl. & Cr. 427 ; and see *Braithwaite v. Britain*, 1 Keen, 206.

dence of an intended breach of trust; for he is in truth the owner, subject to the charge, and it is his duty to satisfy the debts, which the sale may be the very means of enabling him to do.<sup>(e)</sup>

Somewhat similar in principle is the distinction between cases where the trustee is to sell, and apply the proceeds in making good a deficiency in the personal estate to answer debts and legacies, and those in which he is only authorized to sell in the event of the personal estate so proving deficient; in neither case is there any difficulty as to payment of the purchase-money to the trustee, for no purchaser can be expected to involve himself in the administration of the estate; and even in the second of the two cases, if there be a mere trust for sale, and a good title can, independently of its exercise, be made to the legal estate, a purchaser will, it appears, be protected from the necessity of ascertaining the existence of a deficiency, although the trust instrument do not (as it should do) contain a declaration to that effect,<sup>(f)</sup> but if there be a mere power of sale, the title to the legal estate will depend upon the occurrence of the specified event;<sup>(g)</sup>[1] and the

Distinction between the above, and cases in which the object of the sale is to provide for deficiency in personal estate.

(e) *Eland v. Eland*, 4 Myl. & Cr. 428; and see *Higgins v. Shaw*, 2 Dru. & War. 356.

(f) Sug. 847.

(g) See *Dike v. Ricks*, Cro. Car. 335; *Culpepper v. Aston or Austin*, 2 Ch. Ca. 115, 221; Sug. 847.

[1] It was expressly decided, in the case here cited, that where a mere power is given to trustees to sell, for the purpose of raising as much money as the personal estate shall prove deficient in paying the debts, or debts and legacies, it seems that unless the personal estate be actually deficient, the power does not arise, and consequently, cannot be duly executed. See also, *Seymour v. Bull*, 3 Day's Rep. 388; *Williams v. Peyton*, 4 Wheat. 77; *Welman v. Lawrence*, 15 Mass. Rep. 326. And the case of *Culpepper v. Aston*, cited in the text, also appears to be authority, that in such a case, a purchaser is bound to ascertain the deficiency; for in that case, the will seems to have given a mere power to the executors, to raise as much money as the personal estate should fall short in paying the debts. The will was revoked *pro tanto*, by a subsequent conveyance creating a direct trust to sell and pay debts, under which, it seems, the purchaser bought; and therefore, the point did not call for a decision. But it was resolved, that, by the trust [that is, power,] in the will to sell, the purchaser did purchase at his own peril, if the personal estate received, were sufficient; but that if the trust were, as in the deed, the purchaser was safe. It must be borne

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trustees' receipt clause will be ineffective, unless it be so worded as in terms to enlarge the power.(h)[2]

And where a testator devised estates A. and B., upon trust, if any debts remained unpaid, to sell first A., and then (if necessary) B., it was held that while estate A. remained unsold a good title could not be made to B.,  
 [\*290] \*without clear evidence being adduced that the proceeds of A. would be insufficient for the purposes of the trust.(i)

On death of Vendor purchase-money is payable to his Executor and not to his Devisee in trust.

Where a testator himself contracted to sell the estate, the purchase-money must be paid to his executor, and the ordinary receipt clause in the Will does not enable his trustees to give a discharge for it, although the estate be devised to them in trust to complete the contract.(k)[1]

(h) See Sug. 848. See a case of *Lord Rendlesham v. Meux*, 14 Sim. 249; where the opinion of the trustees was in terms made the test of the necessity for a sale.

(i) *Pierce v. Scott*, 1 Y. & C. Ex. 257.

(k) *Eaton v. Sanxter*, 5 Sim. 517.

in mind, that as the power is not well executed, unless there be a deficiency, a purchaser must, at his peril, ascertain the fact, notwithstanding that the trust be for payment of debts generally; or being for payment of particular debts or legacies, the *common clause*, that the trustees receipts shall be sufficient discharges, be inserted in the instrument creating the trust.

[2] "Wherever," says Sugden (3 Sug. on Ven. p. 109) "a power of this nature is given, and even where a trust for such purposes, is raised, it seems advisable to extend this clause a degree farther, by expressly discharging the purchaser or mortgagee, from the obligation of inquiring, whether the personal estate has been got in, and applied; and by expressly authorizing the trustees to raise any money they may think proper, by sale or mortgage, though the personal estate be not actually got in, or applied. For it frequently happens, that the getting in of the personal estate, is attended with great delay and difficulty, during which, the real estate cannot perhaps be resorted to. This will be obviated effectually, by inserting a clause to the above effect. It should however, be accompanied with a further direction that so much of the personal estate, and the money raised under the trust, as shall remain after answering the purposes of the trust, shall be laid out in land, to be settled on the devisees of the real estates."

[1] A contract for sale, converts the estate in equity into personalty. And therefore, if an estate be devised to a trustee for sale, and his receipt be made a valid discharge, and afterwards, the testator himself, sell the estate, his executor would be the right hand to receive the money, and not the trustee, even if the will state the testator's intention to sell, and direct the trustee to carry into execution any contract for sale entered into by



It has recently been held, that where the instrument creating the trust *directs* that any vacancy in the trust shall be filled up within a specified period, which direction is not complied with, the surviving trustees can nevertheless sell and give a good discharge for the purchase-money under the usual receipt clause :<sup>(l)</sup> but this doctrine should perhaps be cautiously acted on. It has also been held, that payment of money to three persons, nominally trustees, but only one of whom was competent to receive it, and a joint and several receipt given by the three, sufficiently discharged the purchaser ;<sup>(m)</sup> this also, it is conceived, is a doctrine open to observation ; it is clear that the effect of such a mode of payment might often be to bring the money under the sole eventual control of persons who had no right whatever to deal with it.

In the case of several trustees, all who have not disclaimed must join in the receipt.<sup>(n)</sup>[2]

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Surviving Trustees when able to sell and receive purchase-money.

Payment to trustees, some of whom are not duly appointed, whether valid.

All Trustees must join in receipt.

(l) *Warburton v. Sandys*, 14 Sim. 622.

(m) *Miller v. Priddon*, 18 L. J., N. S., Ch. 226, V. C. E.

(n) See Sug. 849, and cases cited.

him in his lifetime, and remaining uncompleted at his death ; for the provision in the will, as to the receipts of the trustee, is not applicable to a case in which the testator in his life time, made the contract for sale ; and it was not competent for the testator to impose fetters on the performance of the contract he had entered into. When he had sold any part of his estates, the receipt clause, from the very nature of the case, became inapplicable ; the executor of the testator, then became the proper party to give the receipt for the purchase-money. 3 Sug. on Vend. p. 110.

[2] They must do this, notwithstanding the estate has been released to them ; because, although one trustee release the legal estate to his co-trustees, he cannot delegate the personal trust and confidence reposed in him ; for the rule is *delegatus non potest delegare*. For the purpose of obviating this difficulty, which frequently occurs, Sugden suggests that it might perhaps, be advisable, instead of naming the trustees in the clause, to say, that the receipts "of the trustees or trustee, for the time being, acting in the execution of the trusts hereby created," shall be sufficient discharges. This would render it unnecessary for a trustee who had released the estate to join in any receipt ; there could not be the slightest ground to contend, that any personal trust or confidence was given to the trustees named in the instrument creating the trust ; and therefore the receipt of the trustees acting in the trusts, for the time being, would satisfy, as well the words, as the spirit of the clause. But as one man cannot impose a trust on another, against his consent, a trustee who has refused to accept the trust, and actually renounced, need not join in any receipts ;

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7 &amp; 8 Vict. c. 76.

And we may here refer to the repealed(o) Act of 7 & 8 Vict. c. 76; under which, from the 1st January to the 30th September, 1845, inclusive, the *bona fide* payment to and receipt of any person to whom any money was payable upon any express or implied trust or for any limited purpose, were an effectual discharge to the person paying the same.

[\*291]

Power to lend on mortgage implies power to give receipts.

As to application of purchase-money in payment of charges, distinction between the cases.

Between those where estate is intended to be a continuing security for legacy;

\* A power for trustees to lend the trust-money upon mortgage appears to carry with it a power to give sufficient discharges to the borrowers of the money.(p)

As respects moneys charged upon the estate by the author of the trust, there is a difference between charges the satisfaction of which by means of a sale appears to be contemplated, and those for which the estate seems intended to be a continuing security.(q)

If, for instance, a legacy be charged upon the estate and made payable at a future period, (as where it is given to an infant and made payable, at twenty-one,) and there be nothing to show that the author of the trust intended the property to be sold before the arrival of the time for payment and discharge of the legacy, no sale can in the interval be safely effected, except subject to the legacy ;(r)[1]

(o). See 8 and 9 Vict. c. 106, s. 1.

(p) *Wood v. Harman*, 5 Madd. 368; and see Sug. 848.

(q) See, on a similar point, *Mills v. Osborne*, 7 Sim. 30.

(r) *Dickenson v. Dickenson*, 3 Bro. C. C. 19.

in such cases the receipts of the other trustees, will be sufficient discharges. See 3 Sug. on Vend. p. 111.

[1] In the case here cited, an estate charged with legacies, some of them for infants, was sold, and the amount of the legacies was nearly equal to the purchase-money, and a decree was made for a specific performance upon payment of their legacies to the adult legatees, and the investment in government securities, of the residue of the purchase-money, to remain with all accumulations for the payment of the legacies to the infants, when they should become entitled, and the court said, if in the event the fund should turn out deficient for payment of the infant's legacies, they must still have recourse to the estate for the deficiency. As, Sugden however, very well observes, the title with such a charge, could not have been forced upon the purchaser, and that, no doubt, the decree was submitted to, by the purchaser, who was desirous to take the estate with the risk. The report states that he refused to take the title unless the estate was fully discharged from the legacies, but no objection appears to have been made by him to the decree upon further directions.

the same remarks apply to a life annuity charged upon the estate,<sup>(s)</sup> which in fact stands on precisely the same reasoning, for a life annuity is merely a series of contingent legacies, payable at stated intervals and without interest: in all these cases the apparent intention of the charge is, that the estate shall remain a security for the money: in the case of portions for children it seems doubtful whether the estate can, except under special powers in the settlement, be discharged from any sums which have not become absolutely vested.<sup>(t)</sup>

If, on the other hand, the moneys charged be made payable at the time appointed for sale, the charge seems to be merely equivalent to a trust for payment out of the proceeds of sale; in fact, as respects debts, a charge of them upon the estate is held to amount to a trust for sale:<sup>(v)</sup>[1] so, as we have already seen,<sup>(w)</sup> when the charge is subject to a prior trust for payment of debts or other general purposes, a purchaser is unaffected thereby.<sup>(x)</sup>

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or annuity;

and those where an immediate sale seems to be contemplated.  
Charge of debts equivalent to trust for sale to pay.

[\*292]

The power possessed by creditors upon taking proper proceedings for that purpose, of obtaining payment of their debts out of the descended or devised real estate in the hands of the heir or devisee,<sup>(y)</sup> may be defeated by a

But Statutes making real estate assets or payment do not amount to a charge of debts.

(s) *Elliot v. Merryman*, Barnard. Ch. R. 82.

(t) *Sheppard v. Wilson*, 4 Ha. 392; but see, *contra*, *Gillibrand v. Gould*, 5 Sim. 149; and *Leech v. Leech*, 2 Dru. & W. 568.

(u) *Shaw v. Borrer*, 1 Keen, 559; *Ball v. Harris*, 4 Myl. & Cr. 264; *Gosling v. Carter*, 1 Coll. 644.

(w) *Supra*, p. 284.

(x) *Page v. Adam*, 4 Beav. 269.

(y) 3 and 4 W. & M. c. 14; 47 Geo. III. c. 74, sess. 2; 3 and 4 Will. IV. c. 104.

[1] In this case, where a general charge of the real estate with debts, was followed by a devise to trustees of part of the real estate upon a certain trust, and also, upon trust to sell upon an event which had not happened, the trustees, with the concurrence of the executors, sold this real estate to pay debts; and it was held, that a good title could be made to the purchaser, who was not bound to see to the application of the purchase-money, or to ascertain that there was a deficiency of other assets, first applicable to the payment of the debts; and the rule provided by the statutes, where there is no charge, was held not to govern a case where there is such a charge.

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prior alienation for valuable consideration; and in the hands of the alienee the land is discharged, although the heir or devisee remains personally liable to the extent of the value of land alienated : (z) therefore, since the land itself is free, the existence of debts does not relieve a purchaser from the devisee from the necessity of seeing to the payment of legacies, &c. : (a) while, on the other hand, a purchaser, either from the heir or devisee, is not bound to see to the payment of either specialty or simple-contract debts. (b)

Receipt under usual powers of attorney on mortgage of a fund charged on land, whether a good discharge in equity.

It seems doubtful, when a sum charged upon an estate is assigned by way of mortgage, with the usual power of attorney to receive and give discharges, whether, upon the estate itself being sold, and the sum being paid off out of the proceeds of sale, the assignee can, as against incumbrancers on the equity of redemption of the sum, give a good discharge for the same in equity under the power of attorney; especially if the deed contain a power to sell the security, and the usual clause expressly making his receipts a good discharge in equity, in respect of the proceeds of any sale under the power. (c)

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*\*(4) As to the amount payable in respect of purchase-money ;—how increased or diminished.*

Increase or diminution of purchase-money.

The amount to be paid in respect of the purchase-money may in the several ways hereinafter noticed be increased or diminished.

Increased by interest ;—rate of, if

The most ordinary mode of increase is by the accrual of interest ; [1] as respects which, it will be convenient to

(z) *Richardson v. Horton*, 7 Beav. 193; *Spackman v. Timbrell*, 8 Sim. 253; see *Pimm v. Insall*, 1 Mac. & G. 449.

(a) *Horn v. Horn*, 2 Sim. & St. 448; *Ball v. Harris*, 4 Myl. & Cr. 264, 268.

(b) Sug. 834.

(c) *Brasier v. Hudson*, 9 Sim. 1.

[1] Equity considers that which is agreed to be done, as actually performed. If therefore, a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land; and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made; and it passes, by descent, to his heir as land. The vendor is deemed in equity, to stand

consider, first those cases where there is no special agree-  
ment as to interest; premising that, in such cases, inte-

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no agree-  
ment.

seised of it for the benefit of the purchaser; and the trust attaches to the land, so as to bind the heir of the vendor, and every one claiming under him as a purchaser, with notice of the trust. The heir of the purchaser may come into equity and insist upon a specific performance of the contract, and unless some other circumstances affect the case, he may require the purchase-money to be paid out of the personal estate of the purchaser, in the hands of his personal representative. And the vendor may come into equity for a specific performance of the contract on the other side, and to have the money paid; the remedy, in cases of specific performance, being mutual, and the purchase-money being treated as the personal estate of the vendor, and going, as such, to his personal representatives. Story's Eq. Juris. vol. 2, sec. 790. The purchaser is entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate; and as from that time, the money belongs to the vendor the purchaser will be compelled to pay interest for it, if it be not paid at the day. Interest will not be charged against the purchaser of land, until he is put in default by the tender of a deed. *Stevenson v. Maxwell*, 2 Sand. Ch. Rep. 273. In the case of the sale of vacant or unproductive property, a contract to pay interest will not be implied, where the purchaser is prevented from obtaining his title through the default or negligence of the vendor, although he may have entered into possession. *Id.* Where the vendee in a contract for the purchase and sale of real estate, takes possession of the property, as owner, without having paid the purchase-money, he is bound to pay interest. *Stevenson v. Maxwell*, 2 Comstock Rep. 406. The rule is the same, whether the land is, or is not productive, so long as the possession of the vendee is undisturbed, and the vendor is not in default. *Id.* And where the execution of the deed and the payment of the purchase-money are to be simultaneous acts, the mere omission of the vendor to give the conveyance, before any demand thereof, or offer to pay the purchase-money, is not a default within the meaning of the rule. *Id.* The vendee of land, on a credit, to whom a deed is made and possession given, is not excused from paying interest on the purchase-money, the payment of the principal having been delayed by a third party, who set up an adverse claim, (and commenced a course of litigation, which continued for ten years but which terminated in favor of the vendee's title, the issues and profits. *Selden v. James*, 6 Randolph, 465. The vendor only covenanted to sell and convey a perfect title, (which was so conveyed, as proved by the result of the trial,) not that there should not be claimants who would sue for it. He therefore committed no breach of his covenant, and this is no ground to excuse the vendee from paying interest. *Id.* To excuse the vendee from paying interest during the time that the adverse claim is in suit, it is not sufficient that he should be ready and willing to pay the principal. It ought also to appear clearly that he did in fact keep the money useless and unproductive to him; and that he gave the vendor notice that it was so unproductive. *Id.* Where the vendor is indebted to the vendee, and the sale is made in order to pay the debt, the vendor must

rest, when payable, is payable at law after such rate, not exceeding 5l. per cent., as may be allowed by the jury ;(d)

(d) 3 and 4 Will. IV. c. 42, s. 28.

pay interest from the time the debt is liquidated, until he makes a good title. *Hepburn v. Dunlop*, 1 Wheaton, 179. A vendee of land being let into possession, and the purchase-money remaining unpaid, he shall pay interest thereon, though the vendor be in default ; unless he has not only kept the purchase-money idle, but given the vendor notice that he has so kept it. *Brockenbrough v. Blyth's ex'rs.*, 3 Leigh, 619. When a contract for the sale of land, which the purchaser has paid for, and was not put in possession of, is rescinded for causes free of fraud, the use of the money, and the use of the land, are held to balance each other. The decree should in general restore the money to the purchaser without interest, and the land to the vendor without rents or profits. But if the purchaser has made valuable and lasting improvements on the land, or if it has suffered in his hands through neglect or mismanagement, then these things are the subject of valuation, account, and final settlement by the decree. *Williams v. Rogers*, 2 Dana, 375. In a contract for sale of land, if no day be specified for delivering the deed and possession of the land, but the money be payable after the delivery of the deed, it must be understood that the deed is to be delivered, and possession to be given without delay. If, therefore, this be not done the vendor is bound to account for and pay the profits of the land received by him after the contract ; and the vendee to pay interest on the money from the time it would have been payable, if the deed had been immediately delivered. *Hundley v. Lyons*, 5 Munf. 342. On a sale of land the vendee was put in possession under a covenant for the title ; the vendor from inability, without fraud, fails to make the title ; the vendee abandoned the possession, brings his action on the covenant, and recovers the purchase-money and interest. The vendor is in equity entitled to compensation for the use of the land as a set-off against the interest. The vendee is accountable for rents and profits, and for waste, during the time he held possession, and is entitled to an allowance for improvements viewed as additions to the value of the land when it was abandoned ; the balance against the vendee, on an account comprising these items, to be set off against the interest included in his judgment. *Lovry v. Cox's ex'rs.*, 2 Dana, 469. Where an agreement is made between A. and B. for the purchase of a large tract of land, a title to be made when B. the purchaser pays for it, and B. goes into possession and continues for ten or twelve years, and in all that time pays but a small part of the purchase-money ; equity will not compel A. to convey to B. a portion of the land, equal in value to the money paid by him ; especially when laying off this portion of the land must materially impair the value of the residue of the tract. B. the purchaser is entitled in equity to have the money he has paid refunded, and is not chargeable with the rents and profits while in possession, because by the agreement, he was to take possession and plant and build ; but he is justly chargeable with the interest on the purchase-money. *Porter v. Miller*, 3 Hawks, 628. See Am. Ch. Digest, by Waterman, tit. Vendor and Vendee.

and in equity (as a general rule) after the rate of 4*l.* per cent.<sup>(e)</sup> per annum. Chap. XIII.

If, then, a time be fixed for completion of the contract, and there be delay attributable to the purchaser, he must from that time pay interest upon his purchase-money, although it has been lying idle and appropriated to the purchase,<sup>(f)</sup> and although he has not had possession of the estate, which (as in the case of a house bought for a residence,) has therefore been unproductive; but any actual profits arising from it he will be entitled to.<sup>(g)</sup>

Payable from time fixed for completion if delay rests with purchaser.

If, on the other hand, (a time being fixed for completion,) there be delay attributable to the vendor, the purchaser, if he has or might prudently have been in actual possession or in receipt of the rents and profits of the estate, must pay interest, unless and until his money has been appropriated to the purchase and lying idle, and notice of such being the case has been given to the vendor;<sup>(h)</sup> but it appears that, (if out of possession,) he will not be charged with interest until such time as he might prudently have taken possession: *i. e.*, until a good title was shown;<sup>(i)</sup> and although he may, if he please, in the interim, pay interest and take the rents and profits from the time fixed for completion, (making the vendor account, not only for what he actually has, but for what he might without wilful default, have received,)<sup>(k)</sup> he is not bound to do so where the interest exceeds the rents and profits.<sup>(l)</sup>[1]

From what time payable if delay rests with vendor.

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(e) Sug. 816.

(f) Sug. 793.

(g) *Supra*, p. 116.

(h) *Powell v. Martyr*, 8 Ves. 146; Sug. 794.

(i) *Forteblo v. Shirley*, 2 Sw. 223, cited; *Binks v. Lord Rokeby*, 2 Sw. 222; *Jones v. Mudd*, 4 Russ. 118; *Monk v. Huskisson*, 4 Russ. 121.

(k) *Acland v. Gaisford*, 2 Madd. 28; *Wilson v. Clapham*, 1 Jac. & W. 36.

(l) *Esdaile v. Stephenson*, 1 Sim. & St. 123; *Jones v. Mudd*, 4 Russ. 118, 123.

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[2] Where the delay was occasioned by the vendor, to give effect to the general rule, would be to enable the vendor to profit by his own wrong; and the court gives the vendor no interest, but leaves him in possession of the interim rents and profits. Therefore where a good title

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Whether, until title is shown, purchaser may appropriate his money and claim exemption from interest.

Interest payable by purchaser in possession notwithstanding ambiguity in contract.

And, on the other hand, it has been held that a purchaser, if out of possession, is not justified in laying aside his purchase-money, and rendering it wholly or in part unproductive, until the time when a good title is shown by the vendor; and that, if he do so, it will be at his own risk and loss : (m) this doctrine however seems open to observation. (n)

And the cases seem to show, that when a purchaser is in actual possession or receipt of the rents and profits, he must pay interest upon his purchase-money (unless lying idle with notice of the fact to the vendor) from the time fixed for completion, even although the vendor delay to show a good title, and the contract do not in terms make the purchase-money payable until a good title is shown; for instance, where parties already in possession agreed to purchase land, the purchase-money to be paid on the 25th of March next "on a good and valid title being made and executed," and a title was not made until many years afterward, but they continued in possession, and did not appropriate the purchase-money, they were held liable to pay interest from the above date. (o)

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\*If no time be fixed for completion, the purchaser pays

(m) *De Vesme v. De Vesme*, 13 Jur. 1037; 1 Mac. & G. 336, stated *infra*.

(n) *Vide infra*, 302.

(o) *Attorney-General v. Christ Church*, 13 Sim. 214; *Fludyer v. Cocker*, 12 Ves. 25.

is not shown until a given period, the purchaser will pay interest only from that period, and he will of course take the rents from the same time. But where there is an express stipulation, that if the conveyance is not executed, and the purchase-money paid, by the day named, interest shall be paid until the purchase is completed, the terms of that stipulation, it is said applied to every delay. This was decided by the vice-chancellor in the case cited in the text. He said that the interest did not depend upon any rule of the court, but upon the express stipulation of the parties and the terms of that stipulation applied to every delay, however occasioned. It was highly probable that he could not, in reasoning, assume it as a necessary consequence, that the interest must, under all circumstances, exceed the mesne profits, so as to infer from thence, that the intention of the parties must have been that the purchaser should pay interest at five per cent., only when the delay in completing the contract, was occasioned by himself. The purchaser, he added, must, under the circumstances of the case, pay interest according to the terms of the conditions of sale.



interest upon his purchase money, (unless lying idle with notice of the fact to the vendor,) from, (it is conceived,) the date of the contract, if the purchaser be then in possession, &c.; (p) or, if he be not then in possession, from the time of his taking possession; (q) or from the time at which he might prudently have taken possession; (r) i. e., the time when a good title was shown.[1]

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If no time fixed for completion interest is payable from possession taken or title shown.

(p) *Ex parte Manning*, 2 P. Wms. 410.

(q) *Floyd v. Cocker*, and *Att.-Gen. v. Christ Church*, *ubi supra*.

(r) 2 Sw. 226; and see *Portman v. Mill*, 3 Jur. 356.

[1] Where, in answer to a bill filed against him, defendant insisted that interest was not payable, as the money was to be paid on an event depending upon an act to be done by the vendor, (namely, the execution of the conveyance,) forming a condition precedent to the payment of the purchase money, the court, after observing that the purchaser did not allege that any circumstances had occurred entitling him to relinquish the contract, said, that the act of taking possession was an implied agreement to pay interest; for so absurd an agreement as that the purchaser was to receive the rents and profits to which he had no legal title, and the vendor was not to have interest, as he had no legal title to the money, could never be implied. And where a purchaser took possession under the contract, and upon the master's report of a fact which he considered fatal to the title, returned the possession, and the court ultimately held that he was bound to complete his purchase, Lord Eldon observed, that if the purchaser ultimately obtained possession, he must be considered, by relation, as in possession under that title, from the time at which he took possession, and from that time must be understood to say that if he could hereafter have a title made to him he was to be considered as in possession, and must receive the rents and profits, and account for interest on the purchase money. But he added that it was for those who sell, undertaking that the purchaser might have possession at a particular day, to show that they were in a condition then, to give possession. In that case, he must pay interest from the time at which he took possession, and even for the time during which he returned the possession. Whilst a material objection to the title remains to be cleared up, a purchaser is, of course, justified in declining to take possession, and the court will not compel him to pay interest. If it be agreed that the purchaser shall take possession of the estate, and pay interest on the purchase money from that time, and it afterwards appear that a long time must elapse before a title can be made, the purchaser will be entitled to rescind the agreement. But if the purchaser acquiesce in the delay until the contract is nearly carried into execution, he cannot then appropriate the purchase money, and, by giving notice of that circumstance to the vendor, discharge himself from the payment of interest. Thus, after the execution of a contract for the purchase of an estate, it appeared that an act of parliament was necessary to perfect the title, and that some time must elapse before a title

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Payment  
cannot be  
evaded by  
giving up  
possession.  
Wasting of  
particular

And a purchaser taking possession subsequently to the contract, cannot, by giving up possession, escape his liability even to subsequent interest.<sup>(s)</sup>

Upon the purchase of a reversion, the mere wasting of the particular estate by lapse of time appears to be, (for

(s) See last note.

could be made; and it was therefore agreed that the purchaser should take possession of the estate, and pay interest on the purchase money. Great delays having arisen, and the purchaser thinking exchequer bills in which the purchase money was invested, not safe, he sold them, and gave notice to the vendor that the money was lying ready, and without interest being made of it. After the purchase was completed, and the money paid, the vendor filed a bill, asserting his right to interest, until the execution of the conveyance. The court pronounced in the case, the following judgment: "An agreement of this nature is totally independent of the interest made by the money. When a purchaser is let into possession, the vendor need not mind what is done with the purchase money, because the purchaser agrees to pay interest for the money. And such an agreement can only be affected by great delay, because the purchaser is not to be kept forever bound by a disadvantageous bargain; for the interest might be better than the rents; in which case, if the purchaser was to be bound, notwithstanding an unreasonable delay, the vendor would not mind how long he delayed making a title. If the objection had been taken at a different time, it would have been better. He should have made the objection when he knew that an act of parliament was necessary, as he was not before in possession of that fact. But he waived this delay, and he consents to continue to pay interest, and writes a letter which clearly implies that; or he might have waived the agreement. Afterwards, he thinks he is entitled to say that he will not pay interest. The ground was totally distinct. He had laid out his money in exchequer bills, and then, upon supposition that they were not safe, he sold out, and then gave notice that he would not pay interest. He ought certainly to have given notice before he sold out, and to have given the vendor his option, whether he would choose them to remain at his risk, or would waive his interest. This ground was, however, nothing to the vendor, as he had nothing to do with the interest. The only ground upon which he could have waived the agreement was, the delay in the first instance. The defendant mistook his case; he might have come at an earlier period, and insisted not to pay interest; for a court would not have held him to an indefinite period. Besides, the notice was not given until a long delay could not take place." And the court, for these reasons, decreed the purchaser to pay interest; but as he bound himself by his long acquiescence, he would not give costs, and interest was only given up to the time the conveyance was delivered to the vendor's attorney for execution, although it was not executed until three months afterwards. See 3 Sug. on Vend. pp. 65, 66 and 67, and authorities.

the purpose of the above rules,) equivalent to possession by the purchaser.(t)

Interest upon the purchase-money of timber taken at a valuation is payable only from the date of the valuation;(u)[2] this, however, it is conceived, can only apply to timber which had not attained maturity at the date of the contract; the reason for the rule being, that the augmented value of the timber by growth is included in the valuation, and is an equivalent to interest; upon which Sir E. Sugden remarks, "but this, which was a good reason during the war, will not, in all times, justify the withholding of interest. \*Many cases have occurred in which the augmented value by growth, between the time of entering into the contract and the completion of it, has not been equal to the depreciation in the market price of the timber during the same period."

It is, very deferentially, submitted that the above remark is scarcely pertinent to the principle upon which the rule may be supported: viz., that there is an increase, (not in the market price,) but in the actual quantity or quality of the subject-matter of the contract: the case, in effect, is this: the vendor agrees to sell the timber as existing at

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estate on sale of reversion equivalent to possession.

Interest upon valuation of timber from what date payable.

Growing timber.

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Principle which should determine the liability.

(t) *Ex parte Manning*, ubi supra; *Owen v. Davies*, 1 Ves. 82; *Davy v. Barber*, 2 Atk. 489, 490; *Trefusis v. Lord Clinton*, 2 Sim. 359; Sug. 793-805; and see *Champervorne v. Brooke*, 3 Cl. & Fin. 4; and *Brooke v. Champervorne*, 4 Cl. & Fin. 589; where the vendor's *prima facie* right to interest was excluded by the terms of the contract: and see *Lewis v. Tucker*, 5 Jur. 1105, V. C. W.; but see also *Enraght v. Fitzgerald*, 2 Dru. & W. 43, where interest seems to have been allowed only from the time when a good title could have been made.

(u) See *Waldron v. Forester*, cited Sug. 799.

[2] In this case, it appears that one tenant in common had sold his share of the estate and of the timber to the other, who was let into possession, but no stipulation was made as to interest. The purchase money was not paid. A bill was filed by the vendor, for a specific performance, and a motion was made that the purchase money might be paid into court, or a receiver appointed of the estate sold. And it was accordingly referred to the master to appoint a receiver who was directed to pay to the vendor out of the rents and interest, at the rate of *five per centum per annum* upon the amount of the purchase money, and the value of the timber on the estate. This cause afterwards came to a hearing, when a specific performance was decreed, and the purchaser was decreed to pay interest.

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the time of contract, *plus* its future increase up to the date of the valuation, upon being paid the then estimated value of such timber and increase; he takes the chance of a rise or fall in the market value of timber as a commodity; and a fall can, it is submitted, no more justify him in requiring interest prior to the valuation, (*i. e.*, in effect an increase of purchase-money,) than an unexpected rise would warrant the purchaser in claiming a reduction of the purchase-money, upon the ground of its being of larger amount than he had anticipated.

Timber arrived at maturity.

Nor does it appear that, in the case of timber which has arrived at maturity, interest ought, as a general rule, to be paid prior to the valuation; for there has been no increase, nor any advantage to the purchaser: the case might, however, probably be different, if he had been the cause of, or consenting to, the delay in the valuation; or if, the chief value of the timber consisting in its ornamental character, he had been in possession of the estate.

Interest upon valuation fixtures occupation rent in respect of;

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and of leaseholds.

The case of fixtures, agreed to be taken at a valuation, seems to be the converse of that of growing timber; they being a *deteriorating* property. Where they are of large value, the purchaser, if let into possession before the valuation, ought, it is conceived, to pay an occupation rent up to the date of the valuation; the case seems to be, conversely \*within the principle of *Dyer v. Hargrave*,<sup>(w)</sup> where it was decided that when, upon the sale of leaseholds, the vendor retains possession after the time fixed for completion, he must pay an occupation rent to the purchaser, and receive interest on the purchase-money.

Vendors retaining possession of trade premises yet not held liable to occupation rent.

But where, upon a sale of the lease of a public house and the stock in trade, the purchaser wrongfully refused to perform the contract, and the vendors retained possession and carried on the business, the purchaser was compelled to pay interest on his purchase-money, and also all sums which the vendors had laid out for rent, taxes, and other necessary outgoings, with interest; and was not allowed to charge the vendors with an occupation rent.<sup>(x)</sup>

(w) 10 Ves. 510.

(x) *Dakin v. Cope*, 2 Russ. 176.

It may be observed of this case, that the vendors could not have discontinued the business without incurring the risk of the property being seriously depreciated while the completion of the contract yet remained uncertain : but it was, nevertheless, held on appeal, that they carried it on at their own risk, (and, it is presumed, for their own benefit,) subject to their liability to account to the purchaser for so much of the stock included in the contract as they had actually disposed of.

The cases do not seem to define satisfactorily what is a sufficient appropriation of money by the purchaser to relieve him from the liability to interest: in *Winter v. Blades*; (y) the purchaser, upon entering into the contract, paid into his general account at his banker's a sum less than the purchase-money, but which, together with his existing balance, exceeded the purchase-money; and until completion, his balance was never less than the purchase money, except for a period of three days; and the court discharged him from payment of interest, in respect of the difference between his average balance for the period between the date of his notice to the purchaser and completion, and his average balance for three years immediately preceding the contract: thus establishing, (apparently,) two principles; viz., first, that appropriation of a part of the purchase-money relieves the purchaser from payment of interest *pro tanto*; and secondly, that payment into his general banking account is an appropriation: the latter (if not the former) of which, seems to be disapproved of by Sir *E. Sugden*; (z) and both appear to be questionable.[1]

What a sufficient appropriation of purchase-money to relieve purchaser from interest.

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(y) 2 Sim. & Stu. 393.

(z) Sug. 795; and see *Macdonnell v. Harding*, 7 Sim. 178.

[1] In the case cited in the text, it seems that the purchase-money was £4000, and that, immediately upon entering into the contract, the purchaser called in a sum of money secured by a mortgage amounting to 12,400. and, upon entering into possession of the estate, gave notice to the vendor that he was ready to invest the purchase-money as he should direct, pending the investigation of the title. The vendor hoping for an immediate conclusion of the purchase, did not answer that notice. The investigation of the title, however, occupied nine months. The banker of the de-

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Actual *bona fide* appropriation requisite.

Payment in-  
to bank at  
call.

Purchaser  
succeeding to  
delay cannot  
afterwards  
appropriate  
purchase-  
money.

Express  
agreement to

Sir *E. Sugden* observes, "if the money was not actually and *bona fide* appropriated for the purchase, or the purchaser derived the least advantage from it, or in any way made use of it, the court would compel him to pay interest;" if, therefore, the purchaser pay the money into a bank at which he has an account, it is at least prudent to make the payment to a separate account; in many of the joint-stock banks, interest at a low rate is allowed upon sums deposited; and it is conceived that, in such a case, if the money were payable at call or upon short notice, the purchaser, upon giving the usual notice to the vendor, would escape liability in respect of the difference of interest.

When it appears that some considerable time must elapse before the title can be perfected, and the purchaser agrees to take possession and pay interest, he cannot, (unless there be great and unexpected delay,) by subsequently appropriating the purchase-money and giving notice, escape his liability to interest.(a)

The law upon the general subject seems in its applica-

(a) *Dickinson v. Heron*, Sug. 797.

defendant proved that during the nine months the balance of the defendant in his hands, was never less than 14,000*l.*, except during three successive days, when it was 13,876*l.*; and, one other day, when it was 13,796*l.* The vice-chancellor said, if, after notice given by the defendant, he had made no profit of the purchase-money, then it would not be reasonable that he should be charged with interest. But, that he had made some profit of the money, appeared upon the defendant's own evidence: first, because his balance at his banker's was, in a small degree, and for a few days, reduced below the amount of the purchase-money, but principally because the purchase-money supplied the place of that balance, which he must otherwise have maintained at his bankers. The master was directed to inquire what was the average balance which the defendant maintained at his banker's during the three years preceding the purchase, computing such balances at the end of every month; and, the master was also to inquire what was the average balance which, during the time in question, the defendant maintained at his bankers, computing such balance monthly; and the master was to deduct what he should find to have been the defendant's average balance for the three years, from what he should find to have been the defendant's average balance during the time in question, and it was declared that to the amount of that difference the defendant was not chargeable with interest on his purchase-money. See Sug. on Vend. vol. 2, pp. 63, 64.

tion to cases where there is a special condition as to interest, to be in an unsettled state: it has been held, that a general agreement by the purchaser to pay interest during delay in completion, will bind him during delay caused \*by the vendor:(b) this decision, however, is disapproved of by Sir *E. Sugden*;(c) and two subsequent cases,(d)[1] in which it was decided that agreements to pay interest during delay caused by "any unforeseen or unavoidable obstacles," or "any unavoidable obstacle," did not apply to delays in making out the title, seem seriously to affect its authority: where, however, the agreement was to pay interest during delay arising from "any cause whatever except the wilful(e) default of the ven-

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pay interest  
effect of.

[\*299]

"Unavoidable obstacle."

"Any cause whatever except wilful default."

(b) *Esdale v. Stephenson*, 1 Sim. & Stu. 122; see *Matson v. Swift*, 5 Jur. 645, R.

(c) Sug. 807.

(d) *Monk v. Huskisson*, 4 Russ. 121, note; *Birch v. Podmore*, Sug. 807.

(e) As to what is wilful default, see *Elliott v. Turner*, 13 Sim. 477; *Ex parte Bradshaw*, 16 Sim. 174.

[1] In the first of the cases here cited, the contract fixed a day for the conveyance to be executed, and provided that the crown, on payment of the purchase-money, should be entitled to the rents from that day; and the contract then provided that "if, by reason of any unforeseen or unavoidable obstacles, the conveyance cannot be prepared or perfected for execution on the day named, the crown shall pay interest for the purchase money from that day after the rate of five per cent. per annum, until the completion of the assurances." The title was not made out until a much later period than the day named, and the master of the rolls gave the sellers interest only from the time when a good title was shown. Upon a re-argument, it was submitted that the express stipulation governed the case; but the master of the rolls held that the effect of the stipulation was not to give interest when interest would otherwise not have been payable, but to fix the rate of the interest to which the vendors might be entitled, at five per cent., instead of four per cent. In the second of these cases, it was agreed by the terms of the contract, that if, by reason of any *unavoidable obstacle*, the contract could not be completed on a given day, the purchaser should pay interest at five per cent. from that time, until completion, and the vendor did not show a title until five years after the original bearing of a suit for a specific performance, no unavoidable obstacle being shown, the court refused interest. So that the time occupied by the seller in making out his title was not deemed an unavoidable obstacle within the condition.

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dor,"(f)[2] or, simply, "from any cause whatever,"(g) (an expression, not so strong against the purchaser as the former one, inasmuch as the particular exception of "wilful default" increased the stringency of the first part of the sentence,) it was held, that interest was payable during delays occasioned by the state of the title; but, in the latter case,(h) the order was made without prejudice to any application by the purchaser for compensation: and a different decision was come to, when the expression was, "if, from any cause whatever, the purchase-money shall not be paid on, &c., the purchaser *making default* shall pay interest;"(i) and, of course, a condition containing the words "any cause whatever," even without anything to qualify their effect, would not

"Purchaser  
making de-  
fault."

(f) *Oxendon v. Lord Falmouth*, Sug. 807.

(g) *Greenwood v. Churchill*, 8 Beav. 413.

(h) *S. C.*

(i) *Denning v. Henderson*, 1 De G. & S. 689; and see, at law, *Perry v. Smith*, 1 Car. & M. 554; stated *supra*, p. 59.

[2] In this case, the condition was that if *from any cause whatever*, (except the wilful default of the vendor,) the completion of the purchase made by any purchaser, should be delayed beyond the 26th of December, the purchasers respectively so making delay should pay interest to the vendor, after the rate of five per cent. per annum, from that time till the completion of the purchase, on the residue then unpaid, of the purchase-money. The whole estate was sold by private contract, The purchaser, when the time appointed for completing the contract arrived, insisted that the contract was no longer binding, and took, besides, several objections. Thereupon, the vendor filed a bill for a specific performance, and after a severe contest in the master's office, the master reported in favor of the title, and that a good title was shown before the filing of the bill. Exceptions were taken, both as to the title and the time of showing it. The former exception was overruled, but the latter allowed. But as the vice-chancellor considered that the suit was rendered necessary by the conduct of the purchaser, independently of title, he held that there was no *wilful default* within the meaning of the condition, and therefore that interest at five per cent. was payable from the day named. In *Birch v. Podmore*, where the payment of interest was made to depend upon some *unavoidable obstacle*, the clearing up of the title was not deemed one; whilst, in this case of *Oxeden v. Lord Falmouth*, the same act was not deemed a *wilful default*, so as to defeat the seller's right under a stipulation for interest, whatever might be the cause of delay, except the seller's wilful default.



authorize wilful delay on the part of the vendor: (k) in a very recent case, where the expression, upon a sale by the court, was, "if the purchaser shall fail in making such payments at the time and in manner aforesaid, then and in such case, from whatever cause the delay may have arisen," interest to be paid at *5l. per cent.*, and no abstract was delivered until after the time fixed for completion, and the supplemental abstracts, showing a good title, were not delivered, although repeatedly applied for, until eighteen months after the time fixed for completion, and the purchaser at the commencement of the delay paid the purchase-money into a bank at a low rate of interest, and gave notice thereof to the vendors, and that he should require compensation, and then, upon the title being cleared up, obtained an order for a conveyance, and for payment of his purchase-money into court without prejudice to his right (if any) to compensation, and the purchase was accordingly completed, a petition for compensation in respect of the loss of interest was dismissed by Sir *J. Wigram*, V. C., with costs, upon the ground of the purchaser having completed the contract; but it seems to have been admitted that, while the contract remained incomplete, he might have obtained relief, or might probably have abandoned the contract: (l) and the decision of the vice-chancellor was reversed by Lord *Cottenham* on appeal; his lordship holding, either that interest did not begin to run until the delivery of an abstract showing a good title, or that, if the condition bound the purchaser to pay interim interest, he was entitled to compensation for the non-performance by the vendor of his part of the contract. (m)

But, in the same case, when, it having been decided that the right to interest on the one hand, and to the income of the estate on the other, was not to commence until a good title was abstracted, the purchaser applied for compensation in respect of his money having been com-

(k) See *Paton v. Rogers*, 6 Madd. 256.

(l) *De Visne v. De Visne*, 13 Jur. 205.

(m) *S. C.* on appeal, 1 Mac. & G. 336; and see *Skelton v. Robertson*, 14 Jur. 323, R.

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"Purchaser failing in making payment."

[\*300]

*De Visne v. De Visne*.

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[\*301]

paratively unproductive in the interim, (it having, as before \*stated, been paid into a bank at a low rate of interest upon notice to the vendors,) his lordship held that the claim could not be sustained. His lordship observed—  
 “My opinion is, that, the vendors being in default, the delay having been occasioned by their not performing their part of the contract, are not to exact from the purchaser the payment of interest until the time they showed a good title on their abstract. The effect of that is to postpone the day agreed on for the completion of the contract until the time when the vendors put themselves right, and showed their title to be good on the abstract. The result, therefore, is, until that time there would be no demand to be made by the vendors for the payment, and therefore the interest, which was to stand in the place of that payment, had not commenced to run: it did run when they showed a good title, and not before. The purchaser is to have compensation for the loss and injury which he sustained by the non-performance of the contract by the vendors; but the vendors are not, therefore, to make compensation for any loss not arising out of their contract; that default on the part of the vendors not making it necessary or proper for the purchaser to lay his money by and make it unproductive, for the purpose of throwing the loss of that unproductiveness on the vendors. I think it is carrying the principle out strictly, to postpone the time for paying the purchase-money till the time a good title was shown. The vendors would be entitled to the rents and profits up to that time, and the purchaser's liability to pay interest would commence from that time, and the master must inquire when that time was.”(n)

[\*302]

This decision, it is very deferentially submitted, leaves the law on this subject in an unsatisfactory state, and will probably lead to future litigation: it may be admitted that when a purchaser has agreed to pay interest and take \*the profits from a specified day, notwithstanding delay arising from any cause whatever, there would be much hardship (at least in cases where personal posses-

(n) Mac. &amp; G. 353.

sion of the property is essential to its due enjoyment) in holding this agreement to extend to a delay in showing such a title as would justify a prudent purchaser in accepting possession and so receiving the equivalent for his interest ; but if, on the ground of hardship, the strict words of the agreement (which are sufficiently large in terms, and are notoriously intended in practice, to extend to delays in making out the title) may be disregarded, surely, on the like principle, the purchaser (who may possibly have called in money upon the faith of the vendor's agreement to complete on a certain day) ought to be allowed to appropriate and re-invest it in such a manner as that it may produce some income and yet be ready when required, and to throw the loss of interest on the vendor ; in the particular case, the purchaser seems to have been left in no better position than that in which he was placed by the decision of the vice chancellor.

And it is conceived that if a vendor abstract a good title but be unable at once to verify it, the time for the commencement of interest must be postponed until such title be satisfactorily verified ; so, if an imperfect title be abstracted, or insufficient evidence be given of an apparently perfect title, interest, it is conceived, must commence from the time when the purchaser agreed to accept the imperfect title or insufficient evidence : it is evident that the practical application of the rules laid down in, and deducible from *De Visme v. De Visme*, must in many cases be a matter of very considerable difficulty.

An agreement which reserves to the vendor the rents and profits of the estate until actual completion, precludes any claim to interest on the purchase-money.(o)

\*The vendor may, occasionally, claim an increase of purchase-money, upon the ground of an excess in the actual quantity of the estate over that stated in the particulars.[1]

Vendor's right to interest excluded by agreement to take rent and profits.

[\*303]

Increase of purchase-money in respect of excess in quantity.

(o) *Brooke v. Champenone*, 4 Cl. & Fin. 589.

[1] In a sale of land by the acre, and not of a tract in gross, if an unusual and unreasonable excess or deficit appears, chancery will relieve, particularly if the deed contains no indication that the vendor intended

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As to quantity—statutory acre.

By the 5 Geo. IV. c. 74, ss. 1 and 2, the pole or perch is to contain in length five standard yards and a half; the road, 1210 standard yards; and the acre, 4840 standard yards, being 160 square poles: and, by the 15th section, after the 1st May, 1825, "all contracts, bargains, sales and dealings which shall be made or had within any part

to sell the tract "more or less." *Whaley v. Eliot's heirs*, 1 A. K. Marsh.

343. When there was so great a surplus of land (eight hundred and seventy-six acres, in a patent for fifteen hundred and thirty-three and one-third acres) beyond what the patent called for nominally, as that it could hardly be presumed to have been within the view of either of the parties, the court decreed a conveyance of the surplus, the vendee to pay for the same at the average rate per acre, with interest, which the consideration money mentioned in the contract bore to the quantity of land named in the same. *King v. Hamilton*, 1 Peters, 311. Where a party was bound to convey a specific quantity of land, a tract described by its boundaries; which, upon a survey made upon an order of the court, was found to exceed that specific quantity a fraction more than five per cent.: held, that this small variation would not justify the vendor in withholding the supposed surplus in making the conveyance. *Eubank v. Hampton*, 1 Dana, 343. If a contract to convey B. one hundred acres of land adjoining C., and makes a deed according to a survey furnished calling for one hundred acres; afterward the tract is found to contain one hundred and nineteen acres, A. is entitled to a re-conveyance of the surplus. *Gilmore v. Morgan*, 2 J. J. Marsh. 65. Where A. purchased of B. one hundred and sixty-five acres of land, but obtained from B. an obligation to convey all his right in the tract, that right being supposed to be only one hundred and sixty-five acres, but which turned out to be more, a court of equity will not enforce the claim for the surplus, the vendor having mistaken his interest when he executed the obligation. *Smith v. Smith*, 4 Bibb, 81. If a person who has obtained a survey upon a military land warrant, under the commonwealth of Virginia, for two thousand acres, sells and transfers for a valuable consideration his right to the survey, and assigns the plat and certificate to the purchaser, whereupon he obtains a patent for the land in his own name, and upon a re-survey it appears that the grant conveys two thousand seven hundred acres, the vendor cannot in equity support a claim against the vendee. *Bowles v. Craig*, 8 Cranch, 371. If an obligation to convey land specify upon its face the corners, courses, distances, and quantity of the tract, the obligor will be compelled to convey agreeably to the corners, courses and distance in the obligation, although they contain a surplus of thirty-five acres in a tract of four hundred acres; nor will the obligor be entitled to compensation for the thirty-five acres. *Hampton's Heirs v. Eubank*, 5 J. J. Marsh. 634. If in executing a contract for a certain quantity of land, an extraordinary surplus is conveyed by mistake, the vendor may have relief if he applies in time. Quere as to the general rule for relief in such cases. *Rogers v. Garnett*, 4 Monroe, 271. (See American Chancery Digest, by Waterman, tit. Vendor and Vendee.)

of the United Kingdom, for any work to be done, or for any goods, wares, merchandize, or other thing to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be had and made according to the standard weights and measures ascertained by the act; and in all cases where any special agreement shall be made, with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures, shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void."

The 5 and 6 Will. IV. c. 63, s. 6, enacts "that the measure called the Winchester bushel and lineal measure called the Scotch ell, and all local and customary measures shall be abolished."

Local measures abolished.

Before the passing of these acts considerable diversity existed in the size of the acre; in some places (as in Cheshire) the customary acre contained nearly two statutory acres; while, occasionally, the variation was nearly as much the other way: (p) the applicability of the 15th section of the act of Geo. IV. to contracts for sale of land is not altogether clear; (q) but, it is conceived, that, under the later act, any quantities mentioned either in a contract \*or a conveyance would be referred to the standard measurement, without regard to any local custom (unless expressly referred to.) (r) [1]

Customary variations in the acre.

[304]

(p) *Portman v. Mill*, 2 Russ. 570.

(q) Sug. 376.

(r) And see *Portman v. Mill*, 2 Russ. 570.

[1] In *Portman v. Mill*, which is here cited, it appeared that the lands were described as containing, by estimation, three hundred and forty-nine acres, or thereabouts, be the same more or less, and the agreement stipulated that the parties should not be answerable for any excess or deficiency in the quantity of the premises, but that the premises should be taken by the purchaser, at the quantity, whether more or less; and the actual number of statute acres was less by one hundred acres, than the number stated in the contract. Lord Eldon said that, as to this stipulation, he never could agree that such a clause (if there was nothing else in the

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Where there is no express agreement on the subject, and the contract in general terms includes property which it was not proposed to sell, equity would not enforce it against the vendor, without at least giving him compensation;(s) but we are not aware of any case establishing his general right to additional purchase-money, merely because the estate exceeds the quantity stated in the particulars; since, however, if it were sold professedly by the acre, the excess, if taken, must, it is conceived, clearly be paid for, it seems to follow, from the doctrine laid down in *Hill v. Buckley*,(t) (viz., that where the quantity is stated the price must be considered as fixed with reference thereto) that if called upon to fulfil the contract, he might, independently of agreement, claim compensation: but the general understanding and practice seem to be the other way.

Vendor's  
right to com-  
pensation is  
generally  
question-  
able.

And even where there is a condition for compensation to the vendor, his rights, in any given case, seem far from clear: as is observed in a recent work on conveyancing,(u) "It must indeed be a very strong case of mistake for a vendor (who has full means of ascertaining, with the utmost accuracy, what he intends to sell) to succeed in ob-

(s) See *Att.-Gen. v. Sitwell*, 1 You. & C., Ex. 559; *Marquis Townshend v. Stangroom*, 6 Ves. 328; see *Tyler v. Beversham*, Rep. t. Finch, 80; *Alvanley v. Kinnaird*, 2 Mac. & G. 1.

(t) 17 Ves. 394, 401.

(u) Davidson, vol. iii. p. 34.

case) would cover so large a deficiency in the number of acres, as was alleged to exist there.

The words "more or less," inserted in a deed, should be restricted to a reasonable or usual allowance for small errors in surveys and variations in instruments. See *Hull v. Cunningham's Ex'r.*, 1 Munf. 330, 335, 336; *Jones' dev. v. Carter*, 4 Hen. & Munf. 184; *Wainwright v. Read*, 1 Dess. 573; *Gray v. Handkinson*, 1 Bay, 278; *Pringle v. Wisdon's ex'rs.*, 1 Bay, 269; *Fleet v. Hawkins*, 6 Munf. 188; *Boar v. M'Cormick*, 1 Serg. & Rawle, 166; *Dayne v. King*, 1 Yeates, 322; *Quesnel v. Woodlief*, 2 Hen. & Munf. 173, 174; *Smith v. Evans*, 6 Binn. 102; *Grantland v. Wight*, 2 Munf. 179; *Jolliffe v. Hite*, 1 Call, 301; *Mann & Toles v. Pearson*, 2 Johns. Rep. 37; *Snow v. Chapman*, 1 Root, 528; *Hones v. Barker*, 3 Johns. Rep. 506; *Powell v. Clark*, 5 Mass. Rep. 365; *Howe v. Bass*, 2 Mass. Rep. 380; *Jackson v. Barringer*, 15 Johns. Rep. 471; *Jackson v. Defendorf*, 1 Caines' Rep. 493; *Thomas v. Perry*, 1 Peter's Rep. 49, 58.

taining compensation, or, in other words, an increase of his purchase-money, for an alleged mistake he has himself made :” in a case (*w*) where fields described as “fourteen acres, more or less,” were sold for 973*l*., under an order of the court, and with the usual condition as to misdescription, “a petition stating that the fields in fact contained twenty-seven statutory acres (the acres mentioned in the particulars being intended for customary acres) and that the real value was 1600*l*., and praying that the purchaser might pay the difference or that the property might be re-sold, was dismissed with costs; the decision, however, was chiefly on the ground of delay, four years having elapsed since the sale; this case may, perhaps, be considered to differ in principle from cases where there is a misstatement of quantity incapable of being explained by the difference between statutory and customary measurement; for, possibly, the purchasers at the sale might have bid under the full impression that the fourteen acres were in fact customary acres, and this was alleged to have really happened; Sir Edward Sugden’s remark (*x*) upon the case is, “that no doubt it would be difficult in such a case to make a *bona fide* purchaser buy an estate twice as large as that for which he had contracted, and pay double the amount of the purchase-money for it.” and it may, perhaps, be doubted whether, in any ordinary case, a purchaser could be compelled under such conditions to pay a sum materially exceeding the contemplated amount of purchase-money; such an unexpected liability might, it is obvious, be often productive of the most oppressive and ruinous consequences: in the above case the court seems to have considered that had any relief been granted, it must have consisted in avoiding the sale altogether.[1]

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Alleged under-value from measurement being given in customary instead of statutory acres—no compensation.

[305]

Difficulty of forcing a more expensive purchase on a purchaser.

(*w*) *Price v. North*, 2 Y. & C., Ex. 620.

(*x*) Sug. 372.

[1] If the vendor sells, and the vendee buys a tract of land for so many acres, more or less, and it turns out upon a survey that there is less than the estimated quantity, the buyer shall not be relieved in equity. *Jolliffe v. Hile*, 1 Call, 301. If the contract be for nine hundred acres, more or less, and the tract be found to contain only seven hundred and sixty-five acres, the purchaser will be relieved, if it appear that the seller knew of

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Variations  
in quality of  
estate—no  
allowance  
seem to be  
made in  
favor of  
vendor.

Purchase-  
money, how  
diminished.  
[\*306]

By proceeds  
of estate  
received or  
which might  
have been  
received by  
vendor.

As to the right to compensation in respect of variations in the quality of the estate,—there does not appear to be any case in which a vendor has obtained an increase of purchase-money upon the ground of the character of the property being better than he had himself described it.

On the other hand, the purchase-money is liable to be \*diminished by deductions, either in respect of proceeds of the estate received, or which ought to have been received by the vendor, and which belong to the purchaser; or in respect of mere deteriorations to the estate; or of original defects in the estate.

As to deductions of the first description;—We have already seen that the entire inheritance belongs to the purchaser from the date of the contract,(y) but that the profits or income belong to him only from the time fixed for completion; if, therefore, timber be blown down,(z) or felled, or stone or minerals be quarried or worked after the date of the contract, the proceeds must be accounted for at completion: so, the vendor must account for such rents and profits as he has, or might, but for his wilful default,(a) have received, from the time appointed for completion up to such time as the purchaser has, or might safely have, taken possession:(b) and in one case, where many years' delay had occurred by the default of the vendor who had received part of the purchase-money and retained possession of the estate, he was charged with

(y) *Supra*, p. 116.

(z) *Ibid*.

(a) *Acland v. Gaisford*, 2 Madd. 28; *Wilson v. Clapham*, 1 Jac. & W. 36.

(b) *Vide supra*, p. 294.

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the deficiency at the time of the sale, but did not disclose it. *Bedford v. Hickman*, 5 Call, 236. Although the vendor sells the tract of land whereon he formerly lived, supposed to contain three hundred acres, more or less, as he bought it, yet if he omits to disclose to the vendee that he had previously surveyed it, and found it to contain less than he bought it for, the purchaser will be entitled to a deduction from the purchase-money, equal to the deficiency, notwithstanding he paid part after the deficiency was discovered, and gave a new bond for the balance, with only an oral declaration that he would seek compensation for the loss. *Anthony v. Oldacre*, 4 Call, 489. (See American Chancery Digest, by Waterman, tit. Vendor and Vendee.)



interest at 4*l. per cent.* upon a proportionate part of the rents.(c) Chap. XIII

As to deductions of the second description;—the vendor from the date of the contract holds the estate in trust for the purchaser, subject to payment of the purchase-money; with a right until the time fixed for completion to receive the interim profits; if, therefore, by his wilful acts,(d) or mere negligence, he permit the property to deteriorate,—as by allowing hedges and fences to get out of repair, or the land to remain uncultivated,(e) or by an \*improper course of husbandry,(f) or by ejecting tenants, or acting so improvidently as to occasion their loss,(g)[1] [\*307] the purchaser is entitled to an allowance: and, of course, deterioration may be of such a nature, or to such an extent, as to relieve him from the contract;(h) and the vendor must answer for deteriorations occasioned by the conduct of his tenant, even although the lease has expired:(i) but not for deteriorations after the time fixed for completion, if the title shown were such that the purchaser ought to have taken possession.(j)

So, also, compensation may be due to the purchaser out of the purchase-money in respect of original defects in the estate, either as respects its quantity, or quality, or the extent of the vendor's interest therein; it may be convenient here to consider those questions which relate merely

(c) *Burton v. Todd*, 1 Swanst. 255.

(d) 3 Madd. 395.

(e) *Foster v. Deacon*, 3 Madd. 394.

(f) *Lord v. Stephens*, 1 Y. & C. Exch. 222.

(g) *Harford v. Purrier*, 1 Madd. 532.

(h) *Vide infra*, ch. XVIII.

(i) 3 Madd. 395.

(j) *Minchin v. Nance*, 4 Beav. 332.

[1] Where a purchaser bought an estate in lease, and agreed with the tenant that he should quit at a certain time if a conveyance was made, and the tenant, misconstruing the agreement, quitted at that time, although no conveyance was made, it was held, that the purchaser must submit to the deterioration occasioned by the tenant's quitting, as the loss was occasioned by his own agreement with the tenant. But for that agreement the tenant would not have quitted, and therefore the purchaser, by entering into it without the knowledge of the seller, was the innocent cause of the loss occasioned by it. 3 Sug. on Vend. p. 86; *Harford v. Purrier*, 1 Madd. 532, cited.

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either to the quantity or quality of the estate; reserving for separate discussion, under the head of specific performance, those questions which are in fact questions of title.(k)

A batement allowed for deficiency although land not professedly sold by the acre.

Knowledge of deficiency not readily attributed to purchaser.

[308]

The purchaser will be entitled to compensation for a deficiency in quantity, even although the estate be not sold professedly by measurement;(l) and although, of course, he could not claim compensation if it appeared that he contracted with a knowledge of the deficiency, such knowledge will not be assumed from the fact of his being intimately acquainted with the estate,(m) or even being the occupying tenant;(n) nor is the right to compensation precluded by a condition that he shall not object to complete his purchase if the quantity should turn out less than that stated in the particulars;(o) nor by acts which amount to a waiver of objections to the title.(p)

As to the effect of the expressions "by estimation," "more or less," &c. being added to statement of quantity.

The above rule, where the estate is professedly bought by the acre, or (which is the same thing)(q) where the quantity is stated and there is nothing to rebut the ordinary presumption of price having been fixed with reference to quantity, may, it is conceived, be strictly enforced where no words are introduced to qualify the statement as to quantity; the qualifying expressions, "by estimation," and, "be the same more or less," are, however, in very general use; and the cases do not seem to define their precise effect: they have been held to cover a deficiency of upwards of five out of forty-one acres;(r) but not of 100 out of 349 acres;(s) so, in a case of *Gell v.*

What deficiency they will cover

*Watson*, (t) similar expressions were not allowed to cover a deficiency of two acres in two closes forming part of a

(k) *Vide infra*, Ch. XVIII.

(l) *Hill v. Buckley*, 17 Ves. 394, 401; *King v. Wilson*, 6 Beav. 124.

(m) See *Shackleton v. Sutcliffe*, 1 De G. & S. 609.

(n) *King v. Wilson*, 6 Beav. 124.

(o) *Frost v. Brewer*, 3 Jur. 165.

(p) *Calcraft v. Roebuck*, 1 Ves. jun. 221.

(q) 17 Ves. 401.

(r) *Winch v. Winchester*, 1 Ves. & B. 375.

(s) *Portman v. Mill*, 2 Russ. 570.

(t) Sug. 372.

much larger estate, the quantity of the two closes being stated to be (*according to a specified plan*) 8 a. 1 r. 4 p. Chap. XII.

And where the land is described thus particularly, by stating not only the acres but also the roods, or roods and poles, these qualifying expressions cannot, perhaps, be held to provide for more than inaccuracies in the roods or poles; (*u*) and, of course, a vendor cannot, in any case, rely upon such expressions, if he fraudulently misstate the quantity. (*v*)

*Semble*—only deficiencies in the fractional parts of the acre, when the description particularizes fractional parts.

The purchaser's right is strictly to compensation, and not necessarily to an abatement of purchase-money proportionate to the surface deficiency: thus, where, upon the sale of woodlands, the value of the timber was correctly stated, but the land was represented to contain \*more by twenty-six acres than the actual quantity, he was allowed, as compensation, the estimated value of twenty-six acres of woodland *minus* the wood; (*w*) the case is valuable as illustrating a principle, but, as a decision between parties, its justice may be thought questionable: for it is clear that in purchasing woodland (unless there be no *growing timber*,) the value of the estate depends, not only upon the present worth of the timber and of the land apart from it, but upon the two taken together, with reference to the relative situations of the trees being such as to afford them sufficient nourishment and full space to arrive at maturity.

Purchaser's right confined to compensation.

[309]

Surface deficiency on sale of woods.

As respects the quality of the estate,—A purchaser, it appears, may claim compensation in respect of any deficiency which “admits of a certain estimation”; (*x*) for instance, he may claim it for dilapidations of a house described as “in good repair,” (*y*) or for the want of cultivation of land described as being in “a high state of cultivation,” (*z*) but not for that which does not admit of a pecuniary equivalent; for instance, it is doubtful whether compensation could be claimed in respect of the land lying

Abatement in purchase-money in respect of deficiency in quality may be claimed, when.

(*u*) 17 Ves. 401; 9 Jarm. Conv. by S. 37.

(*v*) 1 Ves. & B. 377; Sug. 371.

(*w*) *Hill v. Buckley*, 17 Ves. 394.

(*x*) 10 Ves. 508.

(*y*) *Dyer v. Hargrave*, 10 Ves. 505; *Grant v. Munt*, G. Coop. 173.

(*z*) *Dyer v. Hargrave*, *ubi supra*.

dispersed, instead of within a ring fence, as described; (a) [1] although such a variation might be sufficient

(a) *S. C. ; Feaster v. Turner*, 6 Jur. 144.

[1] Where an estate was described as being within a ring fence, it appeared that the estate was intersected by other lands, and did not answer the description, but that the purchaser knew the situation of the estate. The court, (after expressing a doubt whether such an objection was a subject of compensation, as it was not certain that a precise pecuniary value could be set upon the difference between a farm compact in a ring fence, and one scattered and dispersed with other lands,) said, that the purchaser was clearly excluded from insisting upon that as an objection to complete the contract. He saw the farm before he purchased; he had lived in the neighborhood all his life. This variance, was the object of sense; he must have known whether the farm did lie in a ring fence or not; and upon the same ground, that the purchaser could not get rid of the contract, on account of the difference in the description of the farm, it determined that he could not be entitled to compensation. If a compensation was given to him, he would get a double allowance; for if he had knowledge that what he proposed to purchase did not answer the description, it must be taken that he bid so much the less. But in this case, it was expressly stated, that the whole estate was in a ring fence; but the court thought that circumstance immaterial, as the purchaser knew that the description was false; and the decision appears to have been grounded upon the doctrine, that, even at law, a warranty is not binding where the defect is obvious, and the learned judge put the cases of a horse with a visible defect, and a house without a roof or windows, warranted, as in perfect repair; and in another case, where there was a representation as to the state of repair, he said that, as to warranty, if the defect was patent or obvious, the warranty would not bind. But where a particular description is given of the estate, which turns out to be false, and the purchaser cannot be proved to have had a distinct knowledge of the actual state of the subject of the contract, he will be entitled to a compensation, although he may be compelled to perform the contract. Thus, in one case, the particular described the house as being in good repair, and the farm as consisting of arable and marsh land, in a high state of cultivation. It appeared however, that the house was not in good repair, and that the land was not in a high state of cultivation. The judge said that the objections were such as a man might have an indistinct knowledge of, and he might have some apprehension that, in those respects, the premises did not completely correspond with the description, and yet the description might not be so completely destroyed, as to produce any great difference in his offer. As to the marsh land, it was very uncertain whether, by any view, it was possible for him to judge of that. It was stated by many witnesses, that the season of the year was just at the breaking of a frost, and represented that no man could, at that time say whether the land was well or ill cultivated. So he might have seen some trifling defects in the house, and might not intend to make the objection, if they turned out to be nothing more than

to avoid the sale : and he cannot claim compensation in respect of a misdescription known to him when he entered into the contract.(b) Chap. XIII.

“(5.) *To whom and how purchase-money should be paid.* [\*310]

The agent(c) or solicitor(d) of the vendor, cannot, without special authority, receive and give a discharge for the purchase-money ;[1] and the usual indorsed receipt is in

Agent or solicitor of vendor not authorized to receive purchase money.

(b) See last note.

(c) *Supra*, p. 86.

(d) *Sug.* 851.

appeared upon the surface. He might consider them too trivial, and not mean to claim compensation for an objection so insignificant. But afterwards when he came to examine, he discovered that the house was materially defective, and very much out of repair. Admitting that he might, by minute examination, make that discovery, he was not driven to that examination; the other party having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that, in every case where, by minute examination, the discovery could be made. The purchaser was induced to make a less accurate examination by the representation, which he had a right to believe. He therefore was entitled to compensation for the defects of the house, and the cultivation of the marsh land. See 3 *Sug. on Vend.* p. 387, 388. *Dyer v. Hargrave and Grant v. Munt*, cited.

[1] An agent entrusted with general powers, must exercise a sound discretion, and he has all the implied powers which are within the scope of the employment. If his powers are special, and limited, he must strictly follow them; but whether there be a special authority to do a particular act, or a general authority to do all acts in a particular business, each case includes the usual and appropriate means to accomplish the end. There is an important distinction between the powers of a general agent, and one appointed for a special purpose. The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, or at a particular place, will bind his principal, so long as he keeps within the general scope of his authority though he may act contrary to his private instructions. But an agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power. The special authority must be strictly pursued. Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limits of his power, though if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power. 2 *Kent's Com.* 617, 621. It seems proper to remark further, that, as a general rule, an agent has not, without express authority, or a fair presumption of one, growing out of the particular transaction, or of the usage of trade, power, to employ a sub-agent to do the business, without the

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How the  
same should  
be paid.

equity no conclusive evidence of payment ;(e) the money, therefore, should in strictness be paid to the vendor, or upon his written authority ; and, in the case of a fiduciary vendor, care should be taken that the proposed mode of payment does not involve a breach of trust ; e. g., it is a breach of trust for trustees for sale to authorize their solicitor to receive the purchase-money : (f) and of course it cannot, except under a special power in the instrument creating the trust, be safely paid to fewer than the entire body of trustees : (g) when an agent is empowered to receive it, there must be a *bona fide* payment ; for instance it cannot be set off against a private debt due from him to the purchaser, (h) unless the vendor, being indebted to the agent, have authorized him not merely to receive, but to pay himself out of the purchase money ; (i) [2] so, if an agent

(e) *Winter v. Lord Anson*, 3 Russ. 488 ; *infra*, Ch. XIV.

(f) See *Ghost v. Waller*, 9 Beav. 497.

(g) *Hall v. Franck*, 11 Beav. 519 ; *et vide supra*, p. 264.

(h) *Yonng v. White*, 7 Beav. 506.

(i) *Barker v. Greenwood*, 2 Y. & C. Exch. 414 ; *Hanley v. Cassan*, 11 Jur. 1068, Exch. ; as to how the loss of money, by the fraud of a person acting as agent for both parties, is to be borne, see *Vandaleur v. Blagrove*, 6 Beav. 565 ; on appeal, 11 Jur. 935 ; *Young v. Guy*, 8 Beav. 147.

knowledge or consent of his principal. The agency is generally a personal trust and confidence which cannot be delegated ; and if the authority in a matter of mere private concern, be confided to more than one agent, it is necessary for all to join in the execution of the power, and they are jointly responsible for each other. Ib. 633.

If a purchaser pay his money to the agent of the vendor before the time when the latter is authorized to receive it. He makes that agent his own for the purpose of paying over the money to the right owner. 13 East Rep. 432.

[2] If the seller is indebted to his agent, whom he authorizes to receive the money out of which he intends the agent should pay himself ; the purchaser to the extent of the agent's debt against the seller, may discharge the purchase money, by setting it off in account with the agent, if he is indebted to the purchaser ; for this can make no difference to the seller if the agent takes care to receive, in cash, the balance due to the seller. A person, however, who does not take the ordinary and proper course of paying the whole in money, must take care to be able to prove that the agent is in this situation. If therefore, he pays by a settlement in account, he takes upon himself the risk of being able to show the debt due from the principal to the agent, and the specific circumstances under which the agent, was appointed to receive the money. 1 Sug. on Vend. 54.

be authorized to receive the money according to the contract, and it be paid to him in anticipation of the time therein named, the purchaser is liable for its due application: (k) if a check be given for it, and, by reason of an unintentional non-compliance with the Stamp Act be so drawn that no action could be maintained upon it, and the bankers upon whom it is drawn fail before payment, or if, (supposing it to be valid and to be presented within a reasonable time,) the bankers upon receiving it with instructions to transmit the amount to London, on the same day, and before the usual hour for closing business, stop payment, the loss falls on the purchaser. (l)

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Upon a sale in bankruptcy, the purchase-money must be paid to the official assignee, unless the court shall otherwise direct. (m)

On sale in Bankruptcy.

Where A., in ignorance of the purchaser being an uncertificated bankrupt, advanced part of the purchase-money and paid it direct to the vendor, and the conveyance was handed over to him immediately after its execution he was held to have a valid lien upon the property; although the purchaser at the same time signed a memorandum stating that he had deposited the deed with A. as a security for the advance. (n)

Lien of third party, advancing part of the purchase-money, as against purchaser's assignees in Bankruptcy.

Upon a sale by a mere statutory owner, under the Lands Clauses Consolidation Act, 1845, the entire purchase and compensation moneys, if amounting to 200*l.* must be paid into the bank, or (if under 200*l.* but exceeding 20*l.*.) into the bank or to trustees, and be applied in manner directed by the 69th and following sections of the act; and no part thereof can be safely paid to such statutory owner. (o) and the above provisions extend to moneys

Payment of consideration money upon sale by statutory owners to Railway Companies, &amp;c.

(k) *Parnther v. Gaitskell*, 13 East. 432; *Cotman v. Orton*, 5 Jur. 142, C.

(l) *Bond v. Worden*, 1 Coll. 583.

(m) 12 and 13 Vict. c. 106. s. 39.

(n) *Meux v. Smith*, 11 Sim. 411; which see, as to the usual mode of payment for public houses. *Bona fide* payments by purchaser, after his secret act of bankruptcy but before petition, are protected by 12 and 13 Vict. c. 106, s. 138.

(o) As to appointment, between lessee and reversioner, of purchase-money paid into court with reference to sect. 74 of Act, see *Ex parte Ward*, 2 De G. & S. 4. Purchase-money of lands of a municipal corpo-

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[\*312]

agreed to be paid to him for assenting to or not opposing "the passing of the bill authorizing the taking of the lands; but the Court of Chancery or trustees, as the case may be, may allot to him a portion of the sum so paid, as a compensation for personal injury, inconvenience or annoyance.(p)

*Prima facie*  
right  
thereto of  
parties in  
possession  
of the land.

Where a railway act provided that where any question should arise upon the act touching the title to any lands, &c., "the parties who should have been in possession or receipt of the rents or profits of such lands at the time of such purchase," &c., should be deemed to have been lawfully entitled, &c., according to such possession until the contrary should be shown to the satisfaction of the court," and the capital and income of the funds, &c., representing the purchase-money were to be paid and applied accordingly, it was held that the party in possession, but whose title was objected to by the company, was entitled to have the money paid out of court on his own affidavit of title :(q) the 79th section of the Lands Clauses Consolidation Act, 1845, contains provisions of a similar nature, but with variations of expression which might probably induce the court to refuse to follow a precedent evidently open to serious objections.

What affidavit necessary on Petition for payment out of Court.

In all petitions under Acts of Parliament for sale of property for public purposes, when the purchase-money is directed by the act to be paid into court, the petitioners claiming to be entitled to the money so paid in, must, in addition to the usual affidavit verifying their title, make oath that they believe they have a good title, and are not aware of any right in any other person, or of any claim made by any other person, to the sum mentioned in the petition or any part thereof;(r) and an affidavit to this

ration may be applied in redeeming incumbrances upon any other lands of the same corporation; *Ex parte Corporation of Cambridge*, 6 Ha. 30; an order for the re-investment of part of the money in land may go on to direct that the balance, if less than 20l., be paid to the tenant for life; *Re Lord Egremont*, 12 Jur. 618.

(p) Sect. 73; see *In re the Duke of Marlborough's estates*, 13 Jur. 738.

(q) *Ex parte Grainge re Great Western Railway Acts*, 3 Y. & C. 62, and see cases cited, p. 66.

(r) Letter of Lord Chancellor to Senior Registrar, dated 12th February, 1842; see 16 L. J., N. S., Ch. 72.



\*effect will not be dispensed with, although the petitioner be aged and infirm, and the company have contracted with him, accepted his title and consented to the prayer of the petition :(*s*) where a person entitled to an aliquot share of a sum of money so brought into court petitions for payment of his share, he need not give notice to the parties entitled to the other shares ;(*t*) nor, where an order has been made for the payment of the interest to a single woman, need the company be served with a petition for its payment to her and her husband on her marriage.(*u*)

The court has refused to sanction the investment of money so paid into court in the purchase of an equity of redemption, or of land the title to which has not been approved by the master :(*w*) and has refused to interfere with the master's decision who reported generally against the propriety of an investment on mortgage :(*x*) an investment in land of a different tenure from that which produced the fund is generally improper, but has been allowed under special circumstances ;(*y*) where the fund has arisen from land belonging to an ecclesiastical corporation sole, the income has been ordered to be paid to the petitioning incumbent, so long as he remained incumbent, and afterwards to the incumbent *for the time being*.(*z*)

What mode of reinvestment thereof will be sanctioned by Court.

\*(6.) *As to purchaser's right to deeds, attested copies, &c.* [\*314]

The purchaser, upon completion, is entitled (subject to the exceptions hereinafter noticed) to all deeds and other muniments of title, however ancient, which are in the possession or power of the vendor :(*a*) and it is conceived

Purchaser's right to delivery of muniments of title.

(*s*) *Ex parte Hollick*, 16 L. J., N. S., Ch. 71.

(*t*) *In re the Midland Counties Railway Company*, 11 Jur. 1095, R.

(*u*) *Ex parte Hordern*, 2 De G. & S. 263.

(*w*) *Ex parte Craven*, 17 L. J., N. S. Ch., 215, V. C.

(*x*) *Ex parte Francklyn*, 1 De G. & S. 528; *Barry v. Marriott*, 2 De G. & S. 491.

(*y*) *In re Cann's estate*, 19 L. J., Ch. 376, V. C. K. B.

(*z*) *In re the Archbishop of Canterbury*, 1 De G. & S. 365; *vide infra* as to costs; and see *In re the Buckinghamshire Railways*, 5 Rail. Ca. 702.

(*a*) Sug. 454; 1 Jarm. Conv. by S. 63; *Austin v. Croome*, 1 Car. & M. 653; *Smith v. Chichester*, 2 Dru. & W. 393.

that the vendor, (unless he retain property held under a common title,) has in general no right to keep copies of any documents other than those which subject him to some future personal liability.[1]

[1] When property in land passes by a deed, the property in the deed passes with it. In England, a conveyance in fee simple usually contains a clause granting all deeds, evidences, writings, &c. This is said to be advisable, though not absolutely necessary, because the deeds pass as incident to the land, by a deed without warranty. But in conveyances to use the clause is highly important, it being otherwise left doubtful whether the trustee or *cestui*, shall have the deeds. A purchaser without warranty and without any express grant of deeds, &c., is not entitled to prior warranty deeds, upon which the grantor might have his warranty paramount. 2 Hilliard on Real Property, 341.

"The practice, as to the custody of title deeds" says Sugden, "has varied greatly since the time of Elizabeth, but the principles of law regarding them, are still the same. Title deeds are things which go with the land, descend with it, and pass with it, by conveyance, without being named. The rule that the person who is entitled to the land, has a right to all the deeds affecting it, is carried out, to all its consequences. Therefore where a seller upon receipt of part of the purchase-money, for a leasehold estate, executed an assignment as an escrow, which, with the deeds, was left with the solicitor for both parties to be delivered to the purchaser, when the rest of the money was paid, it was held that the vendor, could not, by the aid of the solicitor, pledge the deeds to a third party, although an innocent one, for more than the balance due, because the deeds belonged to the purchaser, and neither the seller, nor the solicitor, had any right over them but held them until the purchaser had paid the balance due. The person with whom the deeds were pledged, obtained them from a person who had obtained them by fraud, and although he received them on a valuable consideration and there was nothing on the face of them which showed that there was a title in the purchaser, he could not retain them against the purchaser. And although the purchaser leave the deeds without fraud, but negligently, in the hands of the seller, yet any subsequent purchaser from the first purchaser, may, upon his legal title, recover them in trover, even against a person to whom the original seller has fraudulently conveyed the estate, as if he were still owner of it, and delivered the deeds up to him: his negligence was held not to affect his legal right to the deeds, although his negligence had enabled another to commit a fraud; and besides, there was equal negligence on the part of the holder of the deeds who had not inquired in whose possession the estate itself was. There is great inconvenience in leaving the title deeds in the hands of a seller who has parted with the whole of the property, although he has covenanted to produce them; for the obligation is soon forgotten or disregarded, and the deeds are in danger of being neglected or destroyed."

Where a deed contains a covenant of seisin, the grantee is not entitled to the title deeds. So where the vendor conveys only a portion of his es-

Where, however, the purchaser does not buy all the estate, but a part either remains in the vendor or is sold to another purchaser, the practice (in the absence of agreement) is; for the holder of the largest portion to take the deeds and covenant for their production : but the fact of the vendor having already covenanted for production to a former purchaser, will not, in the opinion of *Sir E. Sugden*,<sup>(b)</sup> justify him in refusing to deliver the deeds, if the second purchaser will allow notice of the covenant to appear in or upon his conveyance, and will covenant to perform the prior covenant : this covenant by the second purchaser would, of course, be entered into with the first purchaser, if the vendor's covenant was made determinable upon his procuring, or the first purchaser will accept, such a substituted covenant ; or otherwise with the vendor himself, and would then take the shape of a covenant to produce the deeds, &c., and to indemnify him against liability under the former covenant.

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Where he purchases only part of the estate.

Vendor having covenanted to produce deeds to other parties not therefore entitled to retain them.

Where property is sold under a trust for sale in a settlement, which goes on to declare trusts of the purchase money (whether the same is to continue money or to be reinvested in real estate,) it is conceived, that the existence of the trusts gives no right to the trustees to retain the settlement ; but the purchaser must covenant to produce it, even although he buy the entire property : in order to avoid this difficulty, it is usual, where an absolute conveyance is intended, to settle the money by a deed distinct from that containing the trust for sale ; or, perhaps, the proper rule in cases of several sales under a settlement

Sale under a settlement.

[\*315]

Deposit of the settlement until completion of the trusts.

(b) Sug. 456.

tate, he for his own security, retains his title deeds. In such case, or where for any other cause, he retains them, he is bound to covenant for their production in case of necessity. This covenant runs with the land ; but if the deed containing it, is not delivered to a subsequent purchaser, the latter may claim the same covenant from his vendor. It is said the covenant in question, runs with the land, so long only, as a privity of estate subsists between the owners of the several estates to which the deeds relate. Where a vendor retains the title deeds, and covenants for further assurance, the purchaser may compel him to covenant for production of the deeds. See 2 Hilliard on Real Property, 377.

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Deposit of  
lease on pur-  
chase of the  
reversion.

Liability of  
mortgagee  
settling several  
mort-  
gages by a  
single deed.

Purchaser  
not entitled  
to deeds used  
as negative  
evidence.

Purchaser's  
right to at-  
tested copies  
of originals  
not taken up.

may be, that, unless the trustees retain a sufficient part of the estate to warrant its retention, it should be deposited for the benefit of all parties until performance of the trusts, and then delivered to the largest purchaser upon his entering into covenants for its production: the right to the deed considered as an instrument creating *terminable* trusts, may, perhaps, be considered as governed by a case (b) in which, upon the purchase of a part of an estate in lease, the court thought that the counterpart of the lease ought to be deposited for the benefit of all parties. [1]

Where a mortgagee of distinct properties belonging to distinct mortgagors transfers the mortgage debts by one deed without their consent, he will have to pay for the necessary attested copies of the deed which he has thus made common to the several titles, and of the necessary covenants for its production. (c)

And the purchaser, it appears, (d) has no right either to the custody, or to a copy, or to a covenant for the production, of instruments produced merely as negative evidence to satisfy him that they contain nothing affecting the title. (e)

If the deeds themselves are not delivered, the purchaser (in the absence of stipulation) may require attested copies

(b) *Shore v. Collett*, G. Coop. 234.

(c) *Capper v. Terrington*, 1 Coll. 103.

(d) *Vide supra*, pp. 158, 166.

(e) Sug. 458.

[1] In *Shore v. Collett*, which is here cited, the reversion of an estate was sold in lots, subject to a ground lease, which contained covenants to the benefit of which the purchaser would be entitled. Nothing was said in the particulars of sale as to the custody of the counterpart of the lease, and it was not in the possession of the sellers, but of one of the other parties to a partition. Lord Eldon said he was of opinion that the counterpart of the lease, not being in the possession of the plaintiffs, was not an objection to their title. No doubt the parties would be entitled to the production of the counterpart of the lease, in order to enable them to proceed against the tenant, if necessary. But unless the deed was deposited, he would not compel the purchaser to take under one of the lessors. It would be too much to put the purchaser to the necessity of filing a bill, from time to time, to have the counterpart delivered to him as often as he might want it. The lease was deposited, and Lord Eldon enforced the purchase.

at the vendor's expense.(f) It has been observed \*by Chap. XIII. Lord *Eldon*, that purchasers set an undue value upon these copies; that, except as between the parties themselves, they are waste paper upon an ejectment;(g) nevertheless they are, it is conceived, of considerable practical importance, if the property is likely to be resold; for the ordinary condition, making them evidence without production of the originals, seldom prejudices a sale; whereas the absence both of originals and attested copies might often cause a serious deficiency in price.

The right, however, seems to be confined to such documents as are necessary to make out a marketable title:(h) Restriction upon such right. nor does it seem to extend to copies of Court Roll, or deeds enrolled under statutes which require enrolment,(i) or, in Sir *E. Sugden's* opinion, to "deeds enrolled for safe custody in a Court of Record," or "wills registered and accessible;"(k) but the practice in this respect does not appear to be settled.(l)[1] If, however, the vendor is in posses-

(f) *Dare v. Tucker*, 6 Ves. 460; *Boughton v. Jewell*, 15 Ves. 176; *Berry v. Young*, 2 Esp. 640.

(g) 6 Ves. 460.

(h) *Dare v. Tucker*, 6 Ves. 460; *Cooper v. Emery*, 1 Phill. 388.

(i) See *Cooper v. Emery*, *ubi supra*; *Campbell v. Campbell*, Sug. 475.

(k) See Sug. 476.

(l) 9 Jarm. Conv. by S. 10.

[1] The reason of this rule, seems to be, that the purchaser having had the inspection of the originals, and procured a covenant to produce them, was not entitled to an attested copy, because being upon record, he could always inspect the record, in the absence of the original, for attested copies are given rather for general use, than as muniments of title, which they are not. There is a great distinction between a deed properly on record, as a bargain and sale, which derives its operation from the enactment, and is therefore evidence without further proof, and a deed enrolled only for safe custody, which is evidence without further proof only against the party who sealed it, and all persons claiming under him. But the question between the seller and purchaser, is not how the original, when it is produced, can be proved, but whether the latter shall have *any* evidence of the contents in his own possession. It is no reason why a purchaser who has not the custody of the original, should not have an attested copy of it, that the original, when produced, can be proved with less ceremony or difficulty, than in a common case. The original, in either case, is out of his immediate reach, and an attested copy, for ordinary purposes, supplies its place. The true distinction must be, between

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sion of attested copies of enrolled deeds, &c., the purchaser can claim them, unless larger property, held by the same title, is retained by the vendor or sold to another purchaser.(m)

Purchaser also entitled to correct for production of original.

And the purchaser, as respects deeds of which he can claim attested copies at the vendor's expense, is also entitled (at the like expense) to a covenant for the production of the originals, and also to a covenant for the production of such copies of Court Roll, and instruments on record as are in the vendor's possession or power ;(n) but the expenses of future production are borne by the purchaser.(o)

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Absence of copies of Court Roll and deeds where production cannot be enforced should be explained.

And it must be remembered, that although the purchaser \*cannot require the production of original copies of Court Roll, or enrolled deeds, &c., if not in the possession or power of the vendor, he yet may, and should in all ordinary cases, inquire into the reason of their non-production ; that is, if their date and character warrant the supposition that they may be denied with an improper motive : for in the well known case of *Whitbread v. Jordan*,(oo) the omission of a mortgagee to make inquiry on the subject was, under the particular circumstances, attri-

*Whitbread v. Jordan*,

(m) Sug. 476.

(n) *Berry v. Young*, 2 Esp. 640, n. ; *Cooper v. Emery*, 1 Phill. 368.

(o) *Berry v. Young*, *ubi supra*.

(oo) 1 Y. & C. 303.

what is in private custody, and what is of public access. It was thought that if a purchaser could at all moments have access to a copy in a public office, he would not be entitled to an attested copy. The rule therefore, seems to extend to instruments not strictly of record, as deeds enrolled for safe custody in a court of record, or wills registered and accessible, which latter, although not in a court of record, yet, in common parlance, are treated as on record. In some cases, however, a purchaser can obtain attested, or office copies, even of instruments on record. For a purchaser is entitled to examine the abstract with the original title deeds, or with office or attested copies of them ; and therefore, if a vendor has not the instrument itself, and cannot obtain it, and can make a title without producing the deed itself, he is bound to procure an office or attested copy of it, to enable the purchaser to ascertain that the abstract is correct ; and when it is obtained, the purchaser is of course entitled to it on the completion of the purchase ; unless indeed, the vendor retains other estates holden under the same title. See 2 Sug. on Vend. p. 80.

buted to wilful blindness ;(*p*) and a similar decision has been pronounced by Sir *L. Shadwell*, V. C., in a very recent case.(*q*)

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(7.) *As to matters necessary to insure the full effect of the executed conveyance.—Registration, enrolment, &c.*

If the property be subject to the operation of any of the local Registration Acts, a memorial of the conveyance should be registered as soon as practicable after execution ; the register having (as before observed) been searched as closely as possible before completion ; when dealing with respectable parties this rule as to immediate registration is often not very strictly attended to, but any departure from it is at the peril of the solicitor ; by delay the purchaser is exposed to the risk not only of a subsequent fraudulent sale or mortgage by the vendor, (which may generally be considered merely nominal,) but also of prior unregistered incumbrancers,(*r*) whose claims may perhaps be unknown even to the vendor, acquiring priority by registration between the execution and registration of the conveyance.[1]

Conveyance should be entered in Local Register (if any.)

Importance of immediate registration.

(*p*) 1 Phill. 255 ; and see a note on the subject in 4 Y. & C. 564.

(*q*) *Worthington v. Morgan*, 16 Sim. 547.

(*r*) As in *Martinez v. Cooper*, 2 Russ. 198.

[1] In this country, all deeds and conveyances of land, except certain chattel interests, must be recorded. If not recorded, they are good, and pass the title as against the grantor and his heirs and devisees, and are void only as to subsequent *bona fide* purchasers and mortgagees whose deeds are first recorded.

In New York, all conveyances of lands, tenements, and hereditaments, and chattels real, except leases for a term not exceeding three years, must be recorded. N. Y. R. S., vol. 1, p. 756, s. 1 ; ib. 762, s. 36. To authorize registration, the deed must be acknowledged, and a certificate of acknowledgment endorsed upon the deed. The deed must be recorded with due diligence, and deeds are to be recorded in the order, and as of the time, when delivered to the clerk for that purpose ; and they have effect according to the priority of the registry. Ib.

In Massachusetts, a conveyance of any freehold estate, or a lease for more than seven years from the making, is void against all but the grantor, his heirs and devisees, and parties having notice, unless the deed be recorded. Rev. Stat. 406, 408 ; Stat. 1844, 289. Acknowledgment by one of two grantors has been held sufficient to authorize the registration.

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What interests are excepted from

The exceptions in the acts are of copyhold estates, leases at a rack-rent, and leases not exceeding twenty-one

of a deed. This is upon the ground that the acknowledgment of one grantor justifies the recording of the deed *as his*; and this gives the requisite notoriety *to the whole instrument*. And it is not material whether the grantors are tenants in common, or owners in severalty. *Pidge v. Tyler*, 4 Mass. 541; 9 *ib.* 218; 5 *ib.* 438; *Shaw v. Poor*, 6 Pick. Rep. 86. A second purchaser or creditor having notice, will acquire a good title against the first purchaser, after waiting a reasonable time for the first purchaser to record his deed, because he may fairly presume that in some way the estate has been restored to the grantor. But, where there is no notice of the first deed, this is postponed to an attachment or subsequent conveyance, without allowing the first grantee any time to record his deed, even though there is notice of an intention to make a deed. If a mortgagee assign the mortgage, and afterwards take a deed from the mortgagor, and the assignment be not recorded, the assignment is invalid against creditors of the mortgagee who may attach the land as his. *Clark v. Jenkins*, 5 Pick. Rep. 280. As between parties claiming under different grantors, priority of registry has no legal effect. Registry is constructive notice only as between purchasers from one grantor. *Tyler v. Hammond*, 11 Pick. Rep. 193. A claiming under an ancient deed, not recorded, had been out of possession more than forty years, and the land had been used as a road. The road being discontinued, B. purchased the land from C., having no notice of the deed to A. A's deed was afterwards recorded. Held, A's title should prevail. *Ib.* The certificate of the register of deeds is conclusive as between the grantee and a creditor, as to the time of recording the deed. *Tracy v. Jenks*, 15 Pick. Rep. 465. See Hilliard on Real Property, vol. 2, pp. 429, 432.

In Connecticut, deeds are recorded in the office of the town clerk, where the land lies. Otherwise, they are good only against the grantor and his heirs. Reasonable time is allowed for recording. Acknowledgment is made by the grantor or his attorney. The power of attorney is acknowledged and recorded. Leases for more than one year are good only between the parties, unless acknowledged before a justice of the peace, or school commissioner, and recorded. The registry of a deed is of no validity, if such deed is defective through the want of some statutory requisites, whether the defect appear upon the face of the instrument or not. *Sumner v. Rhoades*, 14 Conn. Rep. 135. Where a deed is received for record, this entry made upon it by the register, and the deed lodged in the office, the effect is the same as that of actual registration. *McDonald v. Leach*, Kirby Rep. 72.

In Maine, delivery of a deed to the register is, in law, a recording of it. Rev. Stat. 78, p. 373, 586. Where a deed is not recorded, in order to charge a second purchaser, etc., with notice, the fact must be such as to leave no reasonable doubt. Knowledge on the part of the attorney of a creditor who brings the action, will not charge the latter. 7 Greenl. Rep. 195; 1 Shepl. 9; 5 Greenl. 369; 4 Greenl. 20. Conveyance from A. to B. A., at the same time, takes back a deed to himself and his two sons. The former deed was recorded, but not the latter; but A. remained in posses-



\*years where the actual possession and occupation go along with the lease.

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the registra-  
tion act.

sion. Held, such possession was so far notice of the deed to A. that a creditor of B. could not hold the land. *Webster v. Maddox*, 6 Greenl. Rep. 256. A. conveyed to B., and B. entered; but the deed was not recorded. B. conveyed to C., who suffered the land to remain vacant. D. fraudulently induced B. to surrender his deed to B., and himself took a deed from A., which was recorded; entered and occupied till his death; and his administrator then conveyed to E., who was ignorant of D.'s fraud, and of the deed from A. to B. In an action by C. against E., held, B.'s possession was only implied notice of his title, and that E. having no actual notice, should hold against C. *Hewes v. Wiswell*, 8 Greenl. Rep. 94.

In Rhode Island, registration is unnecessary as between the parties and their heirs. Deeds for more than one year are recorded in the office of the town clerk, where the land lies, and take effect in the order of their registration, except that five days are allowed for recording a *defeasance*. Stat. 1841, 2033; 1842, 2068, 2076.

In New Hampshire, deeds, except leases for more than seven years, must be recorded—otherwise, they are valid only against the grantor and his heirs. So also, powers of attorney to convey. Any one interested in a deed may, by warrant from a justice of the peace, require the party having possession of it to put it on record. Rev. Stat. 67, 243, 244; *Southerin v. Mandum*, 5 N. H. Rep. 427, 428. Although, where an owner conveys land, and the grantee neglects to record his deed, the grantor may validly convey anew to an ignorant third person, yet one having no evidence or pretence of title cannot pass a good title to another, merely because the true owner has neglected to record his deed. A stranger to the title cannot, any more than the grantor himself, object to the want of registration. 7 N. H. Rep. 527; 11 Pick. Rep. 193; 6 N. H. Rep. 250; 9 N. H. Rep. 24. A. conveyed to B. The deed was not recorded, and A. occupied till his death, and devised to C. C. entered after A.'s death, and conveyed to D., who had notice of the deed to B. Held, the land passed by the will, and D. should hold against B. and his assigns. *Whitemore v. Bean*, 6 N. H. Rep. 47. A deed or power of attorney must be acknowledged, or proved according to law, in order to authorize its registration. 6 N. H. Rep. 250. Powers of attorney to convey lands, being acknowledged and recorded, are placed on the same footing with deeds as to the reception of copies in evidence.

In Vermont, a deed for more than one year is to be recorded in the town clerk's office, or for want thereof, in the county clerk's office where the land lies. Powers of attorney may be recorded. Rev. Stat. 313, 314. Where a father takes a conveyance to his minor son, but retains the deed himself, without recording it, the son has no claim to the deed or the lands. *Ward v. Morril*, 1 D. Chip. Rep. 322. A. conveyed to B., and at the same time gave him an acknowledgment upon a copy of the deed, that he had received the original for the purpose of registration. A. neglected to record the deed, but the copy, with the receipt upon it, was recorded. Held, this registration was not effectual against a creditor of A.,

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## Copyholds.

The exception of copyholds is not considered in practice to extend to such leases as would require registration

who levied upon the land. *Stevens v. Brown*, 3 Verm. Rep. 42. A conveys to B., whose deed is not recorded. B. conveys to C., and D., having notice of such conveyance, fraudulently procures from B. his deed, returns it to A., himself takes a deed from A., and conveys to E., who had no notice of the prior conveyances. Held, E.'s title should prevail over C.'s, and over that of a grantee of C. having notice. 1 D. Chip. Rep. 42.

In New Jersey, a deed may be recorded in the office of the clerk of the Court of Common Pleas, in the county where the land lies. By acts of June 7, 1799, and November 26, 1801, a deed which is duly acknowledged or proved takes effect between the parties and their heirs, though not recorded. A deed recorded within six months prevails over a subsequent deed to a *bona fide* purchaser, though the latter is first recorded within that time. A deed may be recorded after six months. But in such case it is postponed to a subsequent *bona fide* deed, if the latter is left for registry before the former. And *vice versa* where the former deed is first left. *Den v. Rickman*, 1 Greenl. Rep. 44; 2 Hilliard on Real Prop. 440.

In Pennsylvania, a deed dated prior to the act of 1775 is good without registration. 2 Serg. & Rawle, 44; 5 ib. 246. Where a deed is unrecorded, a second grantee may avail himself of improvements made by him on the land, by way of a consideration, which will give him the prior title. 6 Watts & S. 469. Where a bond of defeasance is unrecorded, but the deed is recorded, the transaction stands like an unrecorded mortgage, which is postponed to a subsequent judgment. 17 Serg. & Rawle Rep. 70. The recording acts do not apply to the assignment of an insolvent debtor. It, however, applies to conveyances affecting lands, though not signed and sealed. And the statutes apply to all written contracts concerning real estate. 6 Watts, 77; 4 Rawle, 242; Ib. 440; 3 Watts & S. 334. The registry acts do not apply to subsequent purchasers claiming under an independent title, but only to those claiming under the grantor in the former deed. They apply to subsequent purchasers at an execution sale. But registration of a deed between third persons is not notice to an execution purchaser not claiming through and under such deeds. 2 Binn. Rep. 497; 6 ib. 119; 5 Serg. & Rawle, 246. The registering of a sheriff's deed in the prothonotary's office, according to usage, is a sufficient recording. 8 Watts' Rep. 68; Hilliard on Real Property, vol. 2, pp. 444, 448.

In Maryland, a deed of a freehold estate, or an estate for more than seven years, or declaring, or limiting any use, must be recorded in the county where the land lies, within six calendar months from its date. Otherwise, the deed is void between the parties. Where, however, registration has been omitted without fraud, it may be authorized by filing a bill in chancery, and will be effectual, except against subsequent purchasers and creditors, if made within six months from a decree. Such decree may be reviewed within eighteen months.

In Delaware, a deed or letter of attorney must be recorded within one year; otherwise, it is invalid against a subsequent fair creditor or purchaser. This does not apply to a lease for fair rent, for not more than

if the estate were freehold;(s) and Mr. *Rigge* recommends the registration of all such deeds affecting this de- Chap. XIII.

(s) Sug. 980.

21 years, attended by possession, or where the lessee is to have possession within one year. Mortgages lodged for registry at the same time, have priority according to their dates; if made for the purchase-money of land, sixty days are allowed for recording. In case of a defeasance, the grantee must endorse upon, and record with his deed, a note thereof. The defeasance, though unsealed, must be acknowledged and recorded within sixty days; else, it is void against purchasers, etc. Laws of Delaware, 1837, 1839.

In Mississippi, the conveyance by writing, sealed and delivered, of any inheritance, freehold, or term for more than one year, is invalid against a creditor or an ignorant purchaser for consideration, unless the instrument is recorded. Rev. Code of Miss., 452. All deeds, agreements, etc., relating to land, except instruments of trust and mortgages, if recorded in three months, take effect from their execution. Deeds of trust, and mortgages, and other instruments recorded after three months, take effect from delivery to the recorder. But of two deeds delivered to the recorder on the same day, the one first executed has priority. Ib. 453, 454. No instrument can be recorded without acknowledgment and proof. The clerk is required to give a receipt for deeds left for record. Ib. 454, 455.

In North Carolina, no conveyance or bill of sale of land (except mortgages) is good and available unless recorded in the county where the land lies, within two years from the date. A mortgage, or deed in trust, is void against creditors or purchasers, unless proved and recorded, like other deeds, within six months. As against such creditors, etc., a title passes only from registry. Marriage settlements and contracts are void against creditors, unless proved, like other deeds, within six months from the making, and recorded in one month thereafter. Rev. Stat. 224-235; Stat. 1842, '43, 80, 81.

In South Carolina, in the district of Charleston, deeds are recorded in the office of the register of mesne conveyance; in other districts, by the clerks of the Circuit Court for each district. They must be recorded within six months from delivery, when the grantor resides in the state; twelve months if in another of the United States; and two years, if abroad. A mortgage is valid against a purchaser, etc., without notice, if recorded in 60 days. Marriage settlements, to be good against creditors, are to be proved and recorded, or lodged in the secretary of state's office, within three months, if made in the state; otherwise in twelve months.

In Ohio, mortgages take effect from the record of them, or presentation therefor. Any other deed must be recorded in six months in the county where the land lies; otherwise, it is fraudulent against a subsequent *bona fide* ignorant purchaser.

In Tennessee, no deed is admissible in evidence until recorded. When duly proved or acknowledged, it may be registered at any time, so as to

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Leases at rack-rent—to what the exception of extends.

scription of property as are not usually recorded by the steward of the manor.(t)

The exception of the greatest practical importance is that of leases at rack rent; Sir *E. Sugden* considers it to be the better opinion that the assignment of a lease held at what was originally a rack rent need not be registered in respect of its having become a valuable property; perhaps, however, this is a doctrine which should be cau-

(t) Rigge on Registration, 88, n.

it give effect between the parties; and within twelve months, to make it effectual against all persons.

In Kentucky, deeds are usually recorded by the clerk of the county where the land lies; but may be, also, in the office of the General Court and Court of Appeals; and this is usually done where the lands lie in different counties. A deed for more than five years is void against a subsequent purchaser without notice, or a creditor, either prior or subsequent unless acknowledged or proved by two witnesses, and lodged for record within eight months. Deeds of mortgage or of trust are limited to sixty days. For a very full and learned exposition of this subject, see Hilliard on Real Prop. vol. 2, c. 89.

That the legislatures of so many different states have introduced such a system for the recording of all deeds, sufficiently proves its utility. Those who have had occasion to examine titles to real estate in our country, will acknowledge that its practical operation is highly beneficial. Every person before buying a piece of land, in the states where deeds take priority from the time of registry, has it in his power, with a very moderate degree of trouble and expense, to obtain satisfactory evidence of the state of the title. The cases indeed are rare, in which a suitable examination shows an apparently clear title in the vendor, that the purchaser is in danger from latent adverse claims.

"In England, the practice of recording deeds is of local and very limited application. It applies to the Bedford level tract, to the ridings of Yorkshire, and to the county of Middlesex. During the period of the English commonwealth, there was an effort to establish county registers, for recording deeds, throughout England. The ancient policy was in favor of the entire publicity of transfers of land, by the fine of record, the livery under the feoffment, the enrolment of a bargain and sale, and the attornment under the grant. But the ingenuity of conveyancers, and the general and natural disposition to withdraw settlements, and the domestic arrangements, from the idle curiosity of the public have defeated that policy. In Scotland, freehold, but not leasehold property, is recorded in a public register; and the notarial instrument must be registered within sixty days, to render it effectual against purchasers and creditors." 4 Kent, 458, *and note*.

tiously received in practice: (v) a lease which contains any *engagement* on the part of the lessee to build upon or otherwise improve the property, cannot, it is conceived, be considered as a lease at a rack rent within the meaning of the exception, although the rent may be reserved from the date of the lease, and may exceed what would be the annual value of the property if let for any other purpose.

Of the third exception it need only be observed, that the words "possession and occupation" are in the conjunctive; (w) so that, in order to avoid registration, the purchaser must not only buy the present interest in the lease, but must actually become the occupier of the premises.

The Middlesex Act has no operation within the City of London. (x)

It appears, that a deed assigning a legacy or other sum of money charged upon land, but not purporting to deal with the land itself, does not require registration; (y) but \*registration is not rendered unnecessary by the circumstance of the conveyance operating as an appointment pursuant to a power in a registered instrument. (z) [1]

Conveyances of lands taken under the provisions of the land clauses consolidation act, 1845, are, it is believed, in practice registered in the local registers, the same as ordinary purchases; and this seems the proper course.

Upon purchasing from a devisee, the will should be registered; and unless this has been or can be done within the period allowed by the act, it is by no means clear

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Whether to building or repairing leases.

Leases for twenty-one years or under.

London not affected by registration act.

Registration of assignment of money charged on land, whether necessary.

[319]  
Of deed of appointment requisite.

Railway companies, &c. to be registered.

Will on purchase from devisee.

(v) Rigge, *ubi supra*.

(w) Rigge, *ubi supra*.

(x) Sug. 982.

(y) *Malcolm v. Charlesworth*, 1 Keen, 63; see p. 73.

(z) *Scrafton v. Quincey*, 2 Ves. sen. 413.

[1] It has been contended that a deed of appointment under a power, need not be registered; because, upon the execution of a power, the interest limited by it, arises under the deed creating the power. But to this, it was answered, that the deed was within the mischief intended to be guarded against by the act, as a purchaser could not otherwise discover whether the power was exercised; and it has accordingly been decided that deeds of appointment must be registered.

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that a good title can be made without the concurrence of the heir.(a)

Memorial—  
its contents.

As to the contents of the memorial which are required by the legislature, see Sir E. Sugden's work, p. 972.(b) In recent practice, however, a somewhat fuller statement of the contents and effect of the deed is required at the registration offices, where forms are supplied for the guidance of the public: the registrars, it appears, may be required to register a *lithographed* memorial.(c)

Attestation  
of.

The memorial itself may be executed either by the vendor or purchaser, or either of their heirs, executors, administrators, guardians, or trustees; but one of the two attesting witnesses to the memorial should be a witness who attested the execution of the deed by (it is said) a *granting* party;(d) where the attesting witnesses are dead, re-execution of the deed in the presence of a witness for the purpose of registration is useless.(e)

[\*320]  
Where deed  
operates as  
a convey-  
ance of  
several  
shares or  
tenements.

\*And it may perhaps deserve consideration whether the above doctrine (which was first advanced by Sir E. Sugden) does not admit of extension; his observation (which gave rise to the decision in *Essex v. Baugh*,(f) is as follows, "One of the witnesses" (*i. e.* to the memorial) "must be a witness to the execution of the deed; and this must be understood to mean, not merely the execution by the party from whom the estate moves." Now, where the estate is conveyed by several owners, say A., B., and C., each seized of an undivided share, and whose execution of the conveyance is attested by different witnesses, a memorial, attested only by the witness who attested A.'s execution of the deed, is evidently not attested by

(a) See an article in 14 Jur. pt. 2, p. 267; but see also Sug. 967.

(b) 11th ed.; and see *Reg. v. Middlesex Registrars*, 15 L. T. 159, where the memorial was held insufficient: the stamp under the late act is reduced to 2s. 6d.

(c) *Ex parte Iveney*, 9 Jur. 371, Q. B.; *Reg. v. The Middlesex Registrars*, 7 Q. B. 156.

(d) Sug. 970; and it was so decided in *Jack v. Armstrong*, 1 Hud. & B. 727, 732; but see 9 Jarm. Conv. by S. 683, contending that it is sufficient if the witness attested the execution of the deed by *either* party.

(e) *Essex v. Baugh*, 1 Y. & C. C. C. 620.

(f) *Ubi supra*.

any witness to the execution of the deed considered as a conveyance of the shares of B. and C., such shares possibly constituting the bulk of the estate. This will, perhaps, appear more obvious, if we suppose a purchaser to take by a single deed a conveyance of several distinct estates from several owners: it would seem to be prudent in all such cases to have the memorial attested by a witness or witnesses to the execution of the deed by all the several owners.<sup>(g)</sup>

As respects lands situate in the Bedford Level, it appears that conveyances omitted to be registered under the Bedford Level Act<sup>(h)</sup> are, nevertheless, valid for all purposes except for entitling the grantees to the privileges conferred by the act on the owners of lands within the level, and for the other purposes of the act.<sup>(i)</sup>

Where a conveyance was made to a purchaser apparently as the beneficial owner, but the purchase-money was, in fact, part of a charitable fund, and the nominal purchaser by a subsequent deed in execution of a power reserved by the conveyance, settled the property in favor of the charity, it was held that both the conveyance and the subsequent settlement required to be enrolled in chancery under the statute of charitable uses.<sup>(k)</sup>

Where the vendor is tenant in tail, it is essential to the validity of the deed, as against the issue in tail and remaindermen, that it should be enrolled in chancery within six calendar months after its execution by the vendor;<sup>(l)</sup> but if so enrolled it takes effect from the time of execution;<sup>(m)</sup> except as against persons claiming for valuable

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Registration,  
under Bed-  
ford Level  
Act.

Conveyance  
to charity  
trustee, as  
apparent  
beneficial  
owner, must  
be enrolled  
under the  
Mortmain  
Act.

[\*321]

On sale by  
tenant in  
tail—disen-  
tailing deed  
to be en-  
rolled.

(g) But see 9 Jarm. Conv. by S. 683.

(h) 15 Car. II. c. 17.

(i) *Willis v. Brown*, 10 Sim. 127.

(k) 9 Geo. II. c. 36; *Att.-Gen. v. Gardner*, 2 De G. & S. 102; *Att.-Gen. v. Munro*, 2 De G. & S. 122; *quare*, as to the effect on the deed, of the death of any subscriber within twelve months after its execution? see *Price v. Hathaway*, 6 Madd. 304; 2 De G. & S. 116; and see, as to the attestation, *Doe v. Munro*, 12 Mee & W. 845; as to the effect of non-enrolment, see *Att.-Gen. v. Ward*, 6 Ha. 477, 482; assurances to a charity of land already in mortmain do not seem to require enrolment, *Att.-Gen. v. Glyn*, 12 Sim. 84; *Walker v. Richardson*, 2 Mee. & W. 882.

(l) 3 & 4 Will. IV. c. 74, s. 41.

(m) *Catell v. Corral*, 4 Y. & C. 228.

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consideration under a prior enrolled deed (although subsequently executed) and without express notice of the voidable estate created by the prior assurance ;(n) the enrolment may be made by either vendor or purchaser.

Consent of protector.

If there be a protector of the settlement, and his consent to the assurance be given by a separate deed, the consent-deed must be executed on or before the day on which the assurance is made by the tenant in tail, and must be enrolled in chancery either at or before the time when the assurance is so enrolled.(o)

Assurances on sale by legal or equitable tenant in tail of copy-holds: such entries and enrolments necessary.  
[\*322]

A legal tenant in tail of lands held by copy of court roll may bar the entail by surrender; and an equitable tenant in tail may bar the entail either by surrender or by deed ;(p) if the assurance be by deed, the same must, \*within six calendar months after execution, be entered on the court rolls of the manor ;(q) the consent of the protector (if any) may be given by deed, (whether the estate be legal or equitable,) or personally to the person taking the surrender (in those cases where the tenant in tail surrenders).(r)

Consent of protector to barring entail in copy-holds.

If the tenant in tail convey by surrender, and the protector consent by deed, such deed must be executed and produced to the lord of the manor, his steward, or steward's deputy, at or previous to the surrender ; and he is to indorse thereon an acknowledgment (which is made *prima facie* evidence of the fact) of the deed having been so produced ; and is to enter the deed and indorsement on the court rolls ; and then to indorse a memorandum of such entry upon the deed.(s)

If the consent of the protector be not given by deed, it must be given to the person taking the surrender by the tenant in tail : and evidence of such consent is to be preserved on the court roll, in manner provided in the 52nd section of the act.

(n) See sects. 38 and 74.

(o) 3 & 4 Will. IV. c. 74, ss. 42 and 46.

(p) Sect. 50.

(q) See sect. 53.

(r) See sects. 51, 52.

(s) Sect. 51.



Where the equitable tenant in tail himself assures by deed, the consent of the protector must be given by deed; and if given by a deed distinct from the principal assurance, such deed must be executed on or before the day of the execution of such assurance by the tenant in tail; and must be entered on the court rolls: (t) and an assurance by deed, by an equitable tenant in tail, is to be void against any person claiming for valuable consideration \*under any subsequent assurances,—(which would include a surrender,) duly entered on the court rolls before the entry thereon of such deed of assurance. (u)

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Must be by deed if equitable tenant in tail disentail by deed.

[\*323]

We have already referred (w) to the necessity for the acknowledgment of conveyances by married women; and to the extended power conferred upon them by a recent statute. (x)

Acknowledgement by married women filing certificate.

By the 89th section of the 4 & 5 Vict. c. 35, it is enacted "that after the 31st day of December, 1841, every surrender and deed of surrender which the lord shall be compellable to accept or shall accept, and also every will and codicil, a copy of which respectively shall be delivered to the lord of the manor by which the lands affected by such surrender, deed of surrender, will and codicil are parcel, or to his steward, or the deputy of such steward, either at any court holden for such manor at which there shall not be any homage assembled, or out of court, and also every grant and admission by the lord of any manor, or his steward, or the deputy of such steward, pursuant to this act, shall be forthwith entered on the court rolls of the manor by such lord, or steward, or deputy; and every entry made on the court rolls of any manor pur-

Statutory provisions for immediate entry on court rolls of copyhold assurances.

(t) The act does not say that the deed of consent must be entered on the court rolls at or before the time when the principal assurance is so entered; but such, it is conceived, is the intention, and it would be at least prudent so to enter it. The 53rd section of the act does not seem to apply to customary freeholds; *Reg. v. Lord of the Manor of Ingleton*, 8 Dowl. P. C. 693.

(u) Sect. 53. Sir Edward Sugden considers it probable that notice would not be held in equity to supply the want of entry on the court rolls; *V. & P.* 597.

(w) *Supra*, p. 267, *et seq.*

(x) 8 & 9 Vict. c. 106.

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suant to this present clause shall, for all purposes whatsoever, be deemed and taken to be an entry made in pursuance of a presentment made at a court holden for such manor by the homage assembled thereat; and the steward, or his deputy, shall be entitled to the same fees and other charges for making such entry on the court rolls as he would have been entitled to in respect of such entry, in case the same had been made in pursuance of a presentment \*made at a court holden for such manor by the homage assembled thereat."

[\*324]

Conveyance of contingent interest in copyholds under late act.

The 6th section of the 8 & 9 Vict. c. 166, appears to extent to contingent interests in copyholds (which previously to the passing of that act were incapable of alienation;)(y) and it is, of course, desirable, although not essential, that the deed of disposition should be entered upon the court rolls.

Assurance of copyholds taken under the Lands Clauses Consolidation Act, 1845, to be entered on the court rolls.

Where lands of copyhold or customary tenure are taken under the lands clauses consolidation act, 1845, the conveyance is to be entered by the steward of the manor upon the court rolls; and upon payment to him of such fees as would be due to him on the surrender of the same lands to the use of a purchaser, he is bound to make such enrolment; and the conveyance, when so enrolled, is to have the effect in respect of such lands, as if the same were of freehold tenure;(z) but, until the same are enfranchised,(a) they are to continue subject to the accustomed fines, rents, heriots, and services. It has been held that, under this provision, the steward cannot claim the fee which would be due to him on the *admittance* of a purchaser.(b)

Expediency [if land not in Registrar County] of indorsing notice of the conveyance on leading

Where the estate is not situate in a register county, and the title deeds are retained by the vendor, it is prudent to indorse a memorandum of the conveyance upon the leading document of title; that is upon the document

(y) Scriven on Copyholds, 135. As to the purchaser's power of compelling admittance by *mandamus*, see *ibid.* 525; admittance may now be granted out of court and out of the manor, 4 & 5 Vict. c. 35, s. 88.

(z) Sect. 95.

(a) See sects. 95, 96.

(b) *Cooper v. Norfolk Railway Company*, 3 Exch. 546; 6 Rail. Ca. 94.

which he would have to produce in proof of his title were he to attempt to make any disposition of the estate inconsistent with the rights of the purchaser.

\*Such a memorandum need only specify the date of, and parties to the conveyance, and particularize the property comprised in it; it is, of course, important to the vendor, that this should be expressed in definite terms; for, if the memorandum were so worded as to leave any doubt as to the precise amount of property comprised in the conveyance, the production of such conveyance would be necessary upon any future dealing with the residue of the estate.

And, as we have already seen, upon the completion of the purchase of an equitable interest in real estate, it is prudent to give notice of the transaction to the owners of the legal estate; but, as a general rule, a purchaser's priority is not affected by his giving or admitting to give such notice; (c) however, upon the purchase of an equity of redemption, such notice to the mortgagee who has the legal estate is material, inasmuch as any further advances which he may make to the mortgagor upon the security of the equity of redemption, in ignorance of the sale, will be valid as against the purchaser; (d) but the mortgagee could not so tack a judgment debt. (e)

#### (8.) *As to the stamps.*

It is also necessary that the conveyance should be duly stamped: the want of a proper stamp, does not, however, affect its validity, but merely renders it inadmissible in evidence. (f)

A deed not stamped, or insufficiently stamped, at the time of execution, might, until recently, be stamped at any subsequent period upon payment of the duty and a

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title deed if remaining with the vendor.

Form of notice.

[\*325]

Propriety of giving notice to trustees on purchase of equitable interest.

Importance of notice to mortgagee on purchase of equity of redemption.

Stamps; deed not evidence without.

Deed may be stamped after execution—penalty.

(c) *Supra*, p. 229.

(d) *Goddard v. Complin*, 1 Ch. Ca. 119; *Blackston v. Moreland*, 2 Ch. Ca. 20; *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609, pl. 7.

(e) *Simmons v. Pettit*, 8 Jur. 209; and see *Whitworth v. Gaugain*, Cr. & Ph. 326.

(f) *Tilsley on Stamps*, 1st ed. 308.

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\*penalty ;(*g*) and, if brought to be stamped within twelve months after execution, the commissioners were empowered to remit all or any part of the penalty ;(*h*) but after the expiration of that time they had no such discretion.(*i*) Under the late act(*k*) a deed may still be stamped after execution on payment of a penalty of 10*l.* and the unpaid duty, and if such duty exceed 10*l.*, then, by way of further penalty, interest at 5*l. per cent.* on its amount, calculated from the first execution of the instrument ; but the sum payable for interest is not to exceed the amount of such unpaid duty ; payment of the penalty, duty and interest is to be denoted by an appropriate stamp ; and the commissioners retain the power of remitting the penalty within twelve calendar months after the execution of the deed.

*ad valorem*  
duty—  
amount of,  
depends solely  
on consideration  
stated.

As we have already seen(*l*) the amount of *ad valorem* duty is determined solely by the consideration appearing on the face of the conveyance ; and a misstatement of the consideration neither avoids the deed nor affects its admissibility in evidence ;(*m*) although it may be made the subject of severe penalties, and, where the full purchase or consideration money is not truly stated, the purchaser, or his representatives, may recover from the vendor or his representatives so much of it as is not so stated.(*n*)

Is payable,  
on what consideration.

The *ad valorem* duty is payable in respect of any money consideration(*o*) directly or indirectly paid or secured or agreed to be paid, or if a debt due to the purchaser and charged on the property, (which would include a registered \*judgment debt,) or of a debt due to any other person or other sum of money which will remain a charge upon the property in the hands of the pur-

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(*g*) 37 Geo. III. c. 136, s. 2.

(*h*) 44 Geo. III. c. 98, s. 24.

(*i*) Tilsley, 304.

(*k*) 13 & 14 Vict. c. 97, s. 12 ; see Tilsley's New Stamp Act, 6.

(*l*) *Supra*, p. 254.

(*m*) Tilsley, 250.

(*n*) *Vide Supra*, p. 254 ; 48 Geo. III. c. 149, s. 24 ; *Gingell v. Purkins*, 19 L. J., N. S., Exch. 129.

(*o*) And as to stock, securities, &c. under the new act, *vide supra*, p. 256.

chaser; (p) a conveyance in discharge of a *bona fide* existing debt not charged upon the property hardly seems to come within the provisions of the acts, but in practice it is usual in such a case to affix the *ad valorem* stamp; (q) where timber, fixtures, or any other parts of the inheritance, are valued separately, the amount of valuation must be stated as part of the consideration; and the duty is payable upon all moneys which are agreed to be paid in all events and whose amount can be ascertained, although the payments may be deferred, and may in part take the name of interest; for instance, where the consideration is the payment of an annuity for an absolute term of years, the duty is (it is conceived) payable on the gross amount of the several payments; (r) so, where the consideration is the grant of an annuity commencing from a day prior to the date of the conveyance, *ad valorem* duty must, it is conceived, be paid upon a proportionate part of the annuity up to the date of the conveyance; so, where the purchase-money is made payable by instalments, with interest upon the balance, from time to time, up to the dates of the several instalments, the duty is payable as well upon such interest as upon the principal. (s)

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On valuation of timber, fixtures, &amp;c.

On all moneys absolutely agreed to be paid, although payable in future, or described as interest.

But where the amount is incapable of being ascertained, (as where the consideration is a life annuity, (t) no *ad valorem* duty would seem to be payable; and the same was, until recently the case, when the consideration consisted of \*stock; but this, as we have seen, (u) has been altered by the late act.

But not on life annuity, or stock transferred.

And the vendor might and may, if he please, *bona fide* accept a less sum than the amount originally agreed to be paid, although the reduction be little more than no-

Purchase-money may after contract be reduced to lessen duty.

(p) See 48 Geo. III. c. 149, s. 22, and 55 Geo. III. c. 184, schedule, tit. Conveyance.

(q) And see *Gingell v. Purkins*, 19 L. J., N. S., Exch. 129.

(r) See, and consider, *Chillingworth v. Chillingworth*, 8 Sim. 404.

(s) See, and consider, *Beete v. Bidgood*, 7 B. & C. 453; see *Lord Hather-ton v. Bradburne*, 13 Sim. 599; and see now the schedule to 13 & 14 Vict. c. 97, tit. Conveyance.

(t) *Blandy v. Herbert*, 9 B. & C. 396.

(u) *Supra*, p. 256.

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Duty not payable on money paid as part of family arrangement.

Is payable on money paid by lessee to party holding agreement for lease.

Duties payable under 13 & 14 Vict. c. 97.

minimal, and the sole object be to avoid a higher duty (w)[1]

And no duty is payable in respect of a sum not paid to, or for the benefit of the person who conveys, or directs the conveyance of the estate ;(x) but paid to, or settled upon other parties as part of a family arrangement.(y)

It has recently been decided, that where a person having an agreement for a lease sells his interest, and procures the lessor to grant the lease direct to the purchaser, and himself joins in the lease as a directing party, the purchase-money is liable to duty, and must be set forth as the consideration on the face of the lease ;(z) and the result, it is conceived, must be the same, although the person holding the original agreement be not made a party to the lease.

The following scale of duties is payable under the late act : (a) viz., where the purchase-money does not exceed 25*l.*, a duty of 2*s.* 6*d.* ; where it exceeds 25*l.* and does not exceed 300*l.*, a duty of 2*s.* 6*d.* for every entire sum of 25*l.* and for any fractional part of such sum ; where it exceeds 300*l.* and does not exceed 600*l.*, a duty of 5*s.* for every entire sum of 50*l.* and for any fractional part of such sum ; and where it exceeds 600*l.*, a duty of 10*s.* for

(w) *Shepherd v. Hall*, 3 Camp. 180 ; Sug. 698 ; Tilsley, 253.

(x) 4 B. & C. 246 ; and, as to general exemptions from stamp duty, see Tilsley, 759, *et seq.*

(y) *Denn d. Manifold v. Diamond*, 4 B. & C. 243 ; *Massy v. Nanney*, 3 Bing. N. C. 478 ; and, *In re Kerrey Glazier*, cited in Tilsley, 246.

(z) *Att.-Gen. v. Brown*, 3 Exch. 662 ; see indemnity clause, 13 and 14 Vict. c. 97, s. 10, in respect of penalties incurred under this doctrine, prior to 20th March, 1850.

(a) According to Mr. Tilsley, the old scale of duties is payable on deeds executed before, although not stamped until on or after, the 11th October, 1850, (Tilsley's New Stamp Act, 3,) *sed qu.* ; see 14 Jur. part 2, 382.

[1] Where the purchaser is authorized to distribute the purchase money between the several conveyances of a property, which requires different modes of conveyance, it has always been considered that the purchase money may, if it can be so apportioned as to lessen the amount of duty which would have been payable on the aggregate sum, and the words of the statute appear expressly to authorize this view.

every entire sum of 100*l.* and for any fractional part of such sum: and by the same act the lease for a year stamp, and \*the corresponding additional duty payable on a feoffment or bargain and sale ~~are~~ abolished; (b) and instead of the old progressive duty, every entire number of 1080 words after the first 1080 words is charged with the amount of the *ad valorem* duty, (if not exceeding 10*s.*) or, if such *ad valorem* duty exceed 10*s.*, or if the deed be not liable to *ad valorem* duty, then with a progressive duty of 10*s.*

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And the act empowers the commissioners, on payment of a fee of 10*s.*, to state what, in their opinion, is the proper amount of duty; and if the same has already been or is then paid, to stamp the deed with a stamp denoting, and which is to be evidence, that the full amount of duty has been paid; and an appeal from their decision lies to the court of exchequer.(c)

Commissioner may determine the proper amount of duty.

And(d) where any lands or other property shall have been actually and *bona fide* contracted to be sold prior to the 20th March, 1850, by any contract or agreement in writing duly stamped, or shall have been, actually and *bona fide* sold under the decree of any court made prior to the said 20th March, and shall be conveyed to the purchaser or any other person by his direction after the 10th October,(e) and before or on the 31st March, 1851, the conveyance is to be exempt from any *ad valorem* duty of a greater amount than would have been payable under the old law; but the grounds of exemption are to be proved to the satisfaction of the commissioners, and a certificate of the matter so proved is to be written on the deed, and signed by them, or some or one of them.

Certain conveyances exempted from increase of duty.

Where the conveyances to several joint-purchasers are comprised in the same deed, duty is payable upon the aggregate of the several purchase-moneys.(f)

What duty payable on single conveyance to joint purchasers.

\*Upon a sub-sale by a purchaser who has not obtained

In case of sub-sales—

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(b) Sects. 6 and 7.

(c) Sects. 14 and 15.

(d) Sect. 16.

(e) 1850 seems to be accidentally omitted.

(f) See 1st Schedule to 55 Geo. III. c. 184, tit. Conveyance.

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sub-purchasers alone considered the purchasers.

a conveyance, such purchaser and his sub-purchasers are considered the vendor and purchasers within the meaning of the stamp acts; and the duty payable upon the conveyances to the sub-purchaser (although the original vendor join therein) is determined solely by the amount paid by such sub-purchasers; and if the original vendor do not join in the conveyance to the sub-purchasers, and the same is duly stamped, no *ad valorem* duty is payable upon any subsequent conveyance by him of the legal estate. (g)

On single conveyance of separate estates to sole purchaser.

And where a purchaser takes, by the same deed, conveyances from several vendors, of properties separately contracted for, duty is payable upon the aggregate of the purchase-moneys. (h)

None on deed of confirmation.

A deed executed by way of confirmation of a previous deed purporting to be a conveyance, and which has paid the *ad valorem* duty, is not itself liable to such duty, although the former deed was inoperative. (i)

Is payable on the principal assurance.

Where there are several assurances, the *ad valorem* duty is payable on the principal assurance; and what is to be deemed such in certain specified cases is defined by the acts: and where in any other case it is doubtful which assurance shall be considered the principal, the parties may determine for themselves which is to be so considered; and the other instruments may (if required) be impressed with stamps denoting payment of the duty. (k)

Denoting stamp.

Copies of court roll procured to be stamped by steward of manor.

Upon the sale of copyholds, the steward must, within four calendar months after the date of any surrender or admittance, deliver out the usual copy of court roll duly stamped; but he may insist on payment of his fees and the stamp duty before accepting the surrender or granting the admittance. (l)

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Conveyance by several

Where persons having separate estates or interests in

(g) See note (f.)

(h) *Ibid.*

(i) *Doe d. Priest v. Weston*, 2 Q. B. 249.

(k) See note (f.)

(l) 48 Geo. III. c. 149, ss. 33 and 34.



the property join in the conveyance, only one set of stamps is necessary : (m) however, in a recent case, (n) where five tenants in common of copyholds contracted to sell at an entire price, the Court of Queen's Bench determined that, although only one stamp was payable upon the surrender, the purchaser must be admitted separately to each of the five estates in common, and that a separate stamp was payable for each admittance.

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owners,  
what  
stamps are  
necessary.

And it is provided, by the 55 Geo. III. c. 184, (o) that "where any deed or instrument operating as a conveyance shall operate also as a conveyance of any other than the property sold, by way of settlement or for any other purpose, or shall contain any other matter or thing besides what shall be incident to the sale and conveyance of the property or relate to the title thereto, the same shall be charged with such further duty as any separate deed containing the other matter would have been chargeable with, exclusive of the progressive duty."

Further duty  
when deed  
has a double  
operation.

Thus, where the conveyance operates also as a mortgage, the double duty is payable; however, in a very recent case, (p) where a purchaser of a copyhold estate from parties entitled thereto as equitable tenants in common, agreed with a third party for loan upon a mortgage of the estate in order to enable him to complete the purchase, and the conveyance and mortgage were effected by the vendors surrendering the estate to the use of the mortgagee, and subject thereto to the use of the \*purchaser, (which surrenders, it is presumed, bore the proper *ad valorem* stamps,) a cotemporary deed, by which the vendors to the extent of their respective shares entered into covenants for title with the purchaser and also separately with the mortgagee, and which contained the usual covenant by the purchaser with the mortgagee for payment of principal and interest, and to insure against fire and a power of sale, was held to be sufficiently stamped with a single

As on a con-  
veyance and  
mortgage.

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(m) Sug. 698.

(n) *The Queen v. Eton College*, 8 Q. B. 526.

(o) See Schedule, tit. Conveyance; see, too, Schedule to 13 & 14 Vict. c. 97, tit. Settlement.

(p) *Rushbrook v. Hood*, 5 C. B. 131; 11 Jur. 931.

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deed stamp and followers; the case, of course, was not within the above clause of the 55 Geo. III., but it was contended that it was a multifarious deed, and fell within the general provisions of the 12 Anne, sess. 2, c. 9, s. 24;(q) but a contrary doctrine was laid down very broadly by the court.(r)

But not on a conveyance to uses directed by purchaser.

Sir E. Sugden (citing Mr. Coventry) remarks that the clause above cited from the 55 Geo. III. c. 184, "does not seem to affect a conveyance of the property sold to such uses as the purchaser may choose to direct."(s)

Matters which do not involve additional duty.

And a covenant to produce title deeds, or an assignment of a term in trust to attend, does not involve the payment of additional duty;(t) nor is it payable in respect of an agreement for a lease of the property to the vendor being included in the conveyance, such agreement being considered as forming part of the contract.(u)

Deed stamp unnecessary although *ad valorem* duty under 11. 15s. Indorsed receipts, &c., count as part of deed.

And a deed stamp is not necessary by reason of the *ad valorem* duty being less than the amount of a deed stamp.(w)

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In counting a deed for the purpose of ascertaining the amount of progressive duty, the schedules (if any,) and indorsed receipt, and indorsed attestation,(x) are included; \*as are also the words and figures contained in any indorsed or annexed map or plan referred to in the deed; but not of a plan neither indorsed nor annexed but only referred to:(y) and it is by the late act declared,(z) retrospectively and prospectively, that progressive duty does not attach in respect of the contents of any deed or instrument liable to stamp duty and duly stamped, and which may be or may have been put or indorsed upon or annexed to the principal instrument, or in any manner incorporated with or referred to in or by the same.

Stamps of adequate

An instrument bearing stamps of sufficient amount but

(q) See Tilsley, 357.

(r) 11 Jur. 932; see the observations of Maule, J., and Wilde, C. J.

(s) Sug. 699.

(t) Sug. 699; *Wolseley v. Cox*, 2 Ad. & El., N. S., 321.

(u) *Doe v. Phillipps*, 11 Ad. & El. 796.

(w) Sug. 700.

(x) Sug. 699.

(y) 1 Jarm. Conv. by S. 726.

(z) 13 & 14 Vict. c. 97, s. 11.

improper denominations, is sufficiently stamped unless they have been specially appropriated to some other description of instrument ;(a) under this provision the lease for a year stamp upon a conveyance or mortgage may often be applied to make good a deficiency in the progressive duty, upon the ground of the freehold having been in reversion, by reason either of an outstanding term for years or of a subsisting tenancy.

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amount, but improper denomination, when sufficient.

We have seen (b) that, in the absence of evidence to the contrary, the courts will presume that a conveyance which was duly executed was also duly stamped.

Presumption in favor of instruments having been stamped.

As to whether fresh stamps become necessary by reason of alterations in the instrument, the general rule appears to be, (c) "that where by reason of an alteration made in it, an instrument becomes a new one, a fresh stamp is requisite," but not in any other case: it has been held where the only conveying party to a marriage settlement had executed it, and then, upon the objection of other parties, a clause was struck out, and the deed was re-executed by the conveying party, the execution was only *in fieri*, and no new stamp was necessary ;(d) and it appears that, where only some of the parties to a deed have executed it, the filling up of blanks, or even making alterations which solely affect the interests of the parties who have not executed, will not involve the payment of additional duty :(e) but this would not extend to a substitution of the name of a sub-purchaser, in place of that of the original purchaser, after the conveyance had been executed by the vendor. (f)

Fresh stamps not necessary if instrument altered while in fieri.

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(9.) *As to the costs.*

The purchaser (in the absence of any express agreement) prepares, and pays for the preparation of, his conveyance ;(g) but the costs of perusal and execution by all

Costs of conveyance are borne by purchaser :

(a) See 55 Geo. III. c. 184, s. 10.

(b) *Supra*, p. 161.

(c) See Tilsley, 366.

(d) *Jones v. Jones*, 1 Cro. & M. 721.

(e) See Tilsley, 374, and cases cited.

(f) *London and Brighton Railway Co. v. Fairclough*, 2 Man. & Gr. 674.

(g) Sug. 692.

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of execution  
by vendor.

necessary conveying parties fall on the vendor ;(h) including, it is conceived, the costs of all matters essential to the validity of the deed as a perfect conveyance ; e. g., the acknowledgment by married women and the filing of the certificate of acknowledgment, and the enrolment of a disentailing deed and deed of consent by the protector upon a sale by a tenant in tail ; but a purchaser always pays for the registration of his conveyance, as an unregistered deed is valid except as against adverse claimants under a registered instrument.

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Where a testator having devised an estate in strict settlement contracted to sell part and died before conveyance, the costs of the necessary suit for obtaining a conveyance under the 1 Will. IV. c. 60, s. 17, were directed to be paid out of the vendor's estate ;(i) so where a vendor \*died intestate before conveyance leaving an infant heir, the costs of the necessary suit, and of the conveyance being settled by the Master, were ordered by Sir L. Shadwell, V. C., to be paid out of the purchase-money ;(k) but in a later case, where the death occurred within two months after the contract, V. C. Knight Bruce refused to give costs, and suggested that there must have been some default on the part of the vendor in the case last referred to ;(l) but where at the date of the contract the legal estate is in an infant the expenses of having the conveyance settled by the master must be borne by the vendor, although the purchaser bought with notice of the state of the title.(m)

Purchaser of  
copyholds  
pays for sur-  
render and  
admittance ;

A purchaser of copyholds pays the fine on admittance, and the Steward's fees both on the surrender and admittance ;(n) but, of course, the vendor pays the private expenses of both himself and the other necessary parties to the surrender ; an agreement to surrender and assure the

(h) *Ibid.*

(i) *Farrar v. Earl of Winterton*, 4 Y. & C. 472.

(k) *Midland Counties Railway Company v. Westcomb*, 11 Sim. 57.

(l) *Hanson v. Lake*, 2 Y. & C. C. C. 328.

(m) *Broune v. Lake*, 15 L. J., N. S., Ch. 34.

(n) *Drury v. Man*, 1 Atk. 95, n., Saunders' ed. ; *Scriven on Copyholds*, 317.

estate at his own costs and charges will not render him liable to the fine payable upon admittance.<sup>(o)</sup> Chap. XIII.

And if the vendor must himself be admitted and pay a fine before surrendering, he of course bears these additional expenses.<sup>(p)</sup> but vendor pays for his own admittance if necessary.

Where an allotment under an inclosure act had been made generally in respect of the landowner's several copyhold tenements, and the custom of the manor was to pay the same fee on admission to part as on admission to the whole of a tenement, the Steward upon the subsequent admittance of a purchaser to part of the allotment was \*held to be entitled to as many fees as the allottee had tenements at the time of the Inclosure.<sup>(q)</sup> Steward's fees on admittance to an allotment held under several titles. [\*336]

Upon the grant of a lease the well-known practice is, for the lessor's solicitor to prepare the lease, and for the lessee to pay both his own and the lessor's expenses; where land is sold in consideration of a rent-charge the assurance partakes of the natures of a conveyance and a lease; upon this ground it is suggested in a work of considerable reputation<sup>(r)</sup> that the costs should be equally divided between the parties; if the vendor require a counterpart of the deed, he may, it is conceived, be fairly asked to pay for the counterpart, but (with this exception) it seems difficult to understand why the circumstance of his sustaining a mixed character of vendor and lessor should be a reason for his paying a proportion of costs which neither vendor nor lessor singly is ever liable to pay. Costs of lease  
Of conveyance in consideration of rent-charge.

Upon a sale under the Lands Clauses Consolidation Act, 1845,<sup>(s)</sup> the purchasers must pay to the vendors all their costs of the conveyance and the costs of making out and proving their title;<sup>(t)</sup> such costs (if the parties differ) to be taxed by the master; the vendors have no lien for Purchasers pay vendors' costs on sale under Lands Clauses Act.

(o) *Graham v. Sime*, 1 East, 632.

(p) See *Drury v. Man*, 1 Atk. 95, n., Saunders' ed.

(q) *Evans v. Upsher*, 16 Mee. & W. 675.

(r) Jarm. Conv. by S. 518.

(s) See sects. 82 and 83.

(t) Costs of the "contracts, sales, and conveyances," held, under a private act, to include costs of making out the title; *In re London and Greenwich Railway Company*, 3 Ha. 82.

Chap. XIII. the amount of such costs upon moneys deposited under the 8th section of the act,(u) and it seems doubtful whether, under the provisions of the above section or of the 80th section, the vendors can recover their costs of or prior to the contract.(w)

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and costs of re-investing purchase-money, and for payment of it out of Court.

\*The purchasers from mere statutory owners under the above act are also liable to pay the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof,(x) other than such costs as are otherwise provided for by the act, and the costs of the interim and permanent investment(y) of the moneys deposited,(z) and of the necessary applications to the court for such investment, and for payment of the income, and for payment out of court of the principal (upon any person becoming absolutely entitled thereto);(a) but those

(u) *In re London and South Western Railway Company*, 16 Sim. 165; *Ex parte Great Northern Railway Company*, 16 Sim. 171.

(w) See, however, *Ex parte Stevens*, 12 Jur. 238; as to whether these costs include the costs of getting the legal estate out of the infant heir or devisees of the vendor, see *Midland Counties Railway Company v. Westcomb*, 11 Sim. 57; *Hanson v. Lake*, 2 Y. & C. C. C. 328; *Eastern Counties Railway Company v. Tuffnell*, 3 Rail. Ca. 133; as to payment, out of the fund in Court, of such costs as the purchasers under a private act are not liable to pay, see *Ex parte Pasmore*, *Ex parte Layfield*, and *Ex parte Twagood*; *Re London Bridge Acts*, 1 Y. & C. Ex. 75, 79, and 588; and see *In re Bishop of Salisbury*, 16 L. T. 122.

(x) Sect. 80. This has been held to include the costs of a reference in lunacy as to the propriety of the sale; *In re Taylor*, 1 Mc. & G. 210; and to have a retrospective effect, where old companies are amalgamated under an act embodying the general act: *Ex parte Elton College*, 16 L. T. 121.

(y) Including the broker's commission on the purchase of stock for interim investment; *Ex parte Corporation of Trinity House*, 3 Ha. 95: costs of interim investment are not given against the company under private acts, which contain no express provision on the subject; *Ex parte Cooke*, 7 Jur. 639, V. C. E.; *Ex parte Crober*, 13 Jur. 481, V. C. E.

(z) See 69th and 80th sections of the act: "wilful" refusal or neglect means, that which arises from mere will or caprice, and not from an exercise of reason: *Ex parte Bradshaw*, 16 Sim 174; see, however, *Elliot v. Turner*, 13 Sim. 477, 485. Where a private act omitted to provide for the costs consequent on payment of the money into court by reason of the title being doubtful, the court refused to throw such costs on a public body purchasing under the act: *Ex parte Angell*; *Re Trinity House Lighthouse Act*, 4 Y. & C. 496.

(a) See, as to the costs of such applications under private acts, *Ex parte Marshall*, 1 Ph. 560; *Ex parte Molyneux*, 2 Coll. 273, and cases

cases are excepted where the moneys are so deposited by reason of the wilful refusal of the party entitled thereto to receive the same, or to convey or release the lands, or by reason of the wilful neglect of any party to make out a good title to the land required ;(b) nor does the liability extend to such \*costs as are occasioned by litigation between adverse claimants.(c) The costs of applying the money in paying off incumbrances affecting other parts of the settled estates do not appear to be provided for by the act.(d) Where the money deposited by a Railway Company, amounting to 644*l.*, was applied (together with other money, making in the whole 1000*l.*) in the purchase of lands, the company were still held liable to pay all the costs ;(e) this decision, however, seems open to remark ; as observed by the company's Counsel, " This is not the expenditure of a few pounds more ; but here is an expenditure of a much larger sum for the benefit of the Vicar. Where is the court to stop? Would it make us pay the expense of a purchase for 10,000*l.* ?"(f) and in a later case *Sir James Knight Bruce, V. C.*, under similar circumstances, in ordering the company to pay the costs, directed that the same should not be increased by reason of the purchase-money exceeding the amount in court.(g) Of course the act only provides for such

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What limit to liability.

there cited ; *Ex parte Gore Langton*, 11 Jur. 686 ; *Ex parte Thoroton*, 12 Jur. 130 ; *Ex parte Crober*, 13 Jur. 481 ; *Ex parte Slater's Devises*, 5 Rail. Ca. 700 ; *Ex parte the Rector of Loughton*, 14 Jur. 102. The transfer of purchase-money from the account of the Railway Act to that of an administration suit, has been held to be a " payment out of court " within the 80th section. *Dinning v. Henderson*, 2 De G. & S. 485.

(b) See note (z.)

(c) Sect. 80 ; see *Ex parte Palmer*, 13 Jur. 781 ; and *Hore v. Smith*, 14 Jur. 55 ; *Ex parte Smith*, 6 Rail. Ca. 150 ; S. C., 19 L. J. N. S., Ch. 56.

(d) See upon similar clauses in private acts, *Ex parte the Earl of Hardwicke*, 12 Jur. 508 ; *In re Yeates*, 12 Jur. 279 ; *Ex parte Trafford*, 2 Y. & C. Ex. 522 ; *Ex parte Northwick*, 1 Y. & C. Ex. 166.

(e) See *Ex parte Hodge*, 16 Sim. 159 ; *Ex parte Lord Palmerston*, 4 Rail. Ca. 57. n.

(f) And see *Ex parte Tetley*, 4 Rail. Ca. 55 ; see, also, *Ex parte Newton*, 4 Y. & C. 518, where extra costs occasioned by the peculiarity of the contract, and which were not considered payable by the company, were directed to be paid out of the fund in court.

(g) *Re Branmer's Estate*, 14 Jur. 236.

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General expressions not sufficient to throw costs of re-investment on purchasers.

Vendor bears additional expenses when estate is incumbered, &c.

costs of re-investment as, in the absence of agreement, would strictly fall upon the statutory vendors as between themselves and the parties from whom they buy for the purpose of re-investment; <sup>(h)</sup> and, except under special circumstances, under the Lands Clauses Consolidation Act, 1845, only the costs of one <sup>\*</sup>re-investment in land are allowed; although the general rule seems to be different under the older acts. <sup>(i)</sup>

But general expressions referring to costs to be incurred in consequence of the sale, or the proposal for the sale, or the taking of the land, whether occurring in an Act of Parliament or a private agreement, <sup>(k)</sup> will not throw upon the purchasers the costs of re-investment.

The purchaser, it appears, may generally, <sup>(l)</sup> although not universally, <sup>(m)</sup> require the vendor to get in, at his own expense, outstanding estates or incumbrances, by deeds distinct from the conveyance: or, if that course be not adopted, he may at least require him to bear the increased expense occasioned by the concurrence of trustees and incumbrancers in the conveyance. When an estate was subject to incumbrances, which, to save expense, were got in by separate deeds, and paid off out of the purchase-money, the court considered that the purchaser should have insisted upon the vendor preparing the deeds, and furnishing an abstract of them, (delaying the execu-

<sup>(h)</sup> *Jones v. Lewis*, 1 De G. & S. 245, and 11 Jur. 511; and see *Ex parte Middle Clayton Trust*, 16 L. T. 123.

<sup>(i)</sup> See *Ex parte Bozmoor Trustees*, 3 Rail. Ca. 513; *In re St. Katherine Dock Company*, *ibid.* 514; *In re Merchant Tailors' Company and London Bridge Act*, 10 Beav. 485, where the costs of a fourth and last re-investment were allowed, the balance sought to be invested being only 63*l.* *Ex parte the Rector of Loughton*, 14 Jur. 102, where the amount of the second investment was only 6*l.*, part of a balance of 20*l.* 9*s.* 5*d.*, and the court directed the balance to be paid to the purchaser, and fixed the company with the costs: and see *Jones v. Lewis*, 2 Mac. & G. 163, where it was held (reversing the decision of V. C. K. B.,) that the vendors were entitled to an unlimited number of re-investments, unless made vexatiously, or in an unreasonable exercise of the direction to invest: and the reasoning of the court would seem to apply to cases within the Lands Clauses Act.

<sup>(k)</sup> See *In re London Bridge Acts*, 13 Sim. 180.

<sup>(l)</sup> Sug. 690; *Jones v. Lewis*, 1 De G. & S. 245; 11 Jur. 511.

<sup>(m)</sup> *Reeves v. Gill*, 1 Beav. 375; and see note to 9 Jarm. Conv. by S. 30.



tion of them, it is presumed, until such abstract was approved and the engrossed deeds themselves were examined by the purchaser;) and that the latter, having laid the drafts of these deeds \*before counsel to peruse and settle on his behalf, could not throw the expenses upon parties who were liable to pay his costs properly incurred.(n)

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If, however, a purchaser keep incumbrances on foot for his own protection, he cannot, it is conceived, throw upon the vendor the costs of the necessary assignment, whether the same be effected by the principal conveyance or by a collateral deed.

But not if purchaser keep incumbrances on foot as protection.

If a solicitor, without special instructions, prepare the conveyance during the existence of a known impediment to completion upon which the matter eventually goes off, he cannot claim the costs of the conveyance.(o)

And we may here refer to the 6 and 7 Vict. c. 73, by which a solicitor's bill of costs, although composed entirely of conveyancing charges, may be referred for taxation upon petition presented either to the Lord Chancellor or the Master of the Rolls; the order upon a petition presented within twelve months after delivery but before payment of the bill is of course;(p) although part of the items be covered by a special agreement,(q) or although application be made by a third party liable to pay:(r) and may be made by the Vice-Chancellor.(s) Under special circumstances,(t) the bill may be referred at any time within, but not after, twelve months after payment:(v)

Taxation of conveyancing costs under 6 & 7 Vict. c. 73.

(n) *Jones v. Lewis*, *ubi supra*.

(o) *Potts v. Dutton*, 8 Beav. 493.

(p) See *In re Gaiskell*, 1 Phil. 576; and *In re Pender*, 2 Phil. 73; want of signature by the solicitor is immaterial on an application by the client for taxation, *S. C. ib.* 69; as to the principle on which a bill will be taxed, see *Cooper v. Ewart*, 2 Phil. 362; *In re Smith*, 9 Beav. 182.

(q) *In re Eyre*, 2 Phil. 367.

(r) *In re Bracey*, 9 Beav. 338.

(s) See *In re Carew*, 8 Beav. 128; *In re Howard*, *ib.* 424.

(t) As to which see *In re Drake*, 8 Beav. 123; *In re Wells*, *ib.* 416; *In re Bennett*, *ib.* 467; *In re Jones*, *ib.* 479; *In re Fyson*, 9 Beav. 117; *In re Colquhoun*, *ib.* 146; *In re Currie*, *ib.* 602; *In re Neale*, 10 Beav. 181; *In re Drew*, 10 Beav. 368; *In re Bagshawe*, 2 De G. & S. 205.

(v) See sect. 41; *In re Massey*, 8 Beav. 458; *Re Harper and Jones*, 10 Beav. 284, 290; but the court under its general jurisdiction will enforce with costs a solicitor's undertaking to deliver his bill, although more than

such special circumstances are usually pressure, \*as when immediate payment is required at a time when delay in completing the business would seriously inconvenience the client ;(w) and secondly, error or overcharge in the bills. The overcharges may be such as of themselves to afford evidence of fraud, and then very slight if any evidence of pressure is necessary to induce an order for taxation ;(x) but mere overcharge, although a necessary ingredient, is in itself insufficient,(y) even although the bill was paid under protest.(z) Mere retention of the amount of the bill out of moneys in the hands of the solicitor does not amount to payment, unless there is also a settlement of account :(a) nor does a settlement by way of compromise, if effected under pressure, oust the jurisdiction :(b) the court, however, upon a petition under the act can only ascertain by the ordinary rules of practice the amount payable, and cannot determine whether, prior to the business being done, any special agreement existed as to the manner in which the costs were to be charged, or the mode by which the amount should be ascertained.(c)

[\*342] Under the 38th section, the \*right of referring the bill is given, not only to the immediate client, but also to any persons who, as between themselves and such client, may be liable to payment ; but, in such a case, the bill must be taxed as between the solicitor and his immediate

twelve months have elapsed since payment, it having been paid on the faith of such undertaking ; *In re Foljambe*, 9 Beav. 402.

(w) See *Ex parte Wilkinson*, 2 Coll. 92 ; *In re Tryon*, 7 Beav. 496 ; see also *In re Jones*, 8 Beav. 479 ; *In re Harrison*, 11 Beav. 57.

(x) *In re Harding*, 10 Beav. 250, 252 ; *In re Sladden*, 10 Beav. 488 ; *In re Welchman*, 11 Beav. 319.

(y) *In re Stirke*, 11 Beav. 304 ; specific items of overcharge must be alleged and proved, *In re Thompson*, 8 Beav. 237.

(z) *In re Stirke*, *ubi supra*, and *In re Welchman*, 11 Beav. 319 ; *In re Harrison*, 11 Beav. 57 ; as to the meaning of the words " under protest," see 8 Beav. 462.

(a) See *In re Catlin*, 8 Beav. 121 ; *In re Bignold*, 9 Beav. 270 ; and as to payment by a promissory note, see *Sayer v. Wagstaff*, 5 Beav. 415 ; *In re Currie*, 9 Beav. 602 ; see also *Re Harper and Jones*, 10 Beav. 284.

(b) *In re Stephen*, 2 Phil. 562 ; see *In re Whitcombe*, 8 Beav. 140.

(c) *In re Rhodes*, 8 Beav. 224 ; see 2 Ph. 575 ; and see *In re Thompson*, 8 Beav. 237 ; *In re Beale*, 11 Beav. 600.

client ;(d) so that if a purchaser has agreed to pay the vendor's costs, the vendor's solicitor, upon taxation on the petition of the purchaser, will be allowed costs properly incurred as between himself and the vendor, although they may have been improperly incurred as between the vendor and the purchaser : so also, as in an ordinary case, special circumstances must be proved if the bill has been paid, although the payment were by the immediate client (e) and the lapse of twelve months since payment precludes taxation under the act ;(f) and a bill cannot be taxed at the instance of a person who, under no previous liability, voluntarily pays it.(g) A bill when delivered is *prima facie* binding on the solicitor for the purposes of taxation, and he is not entitled, as of course, either on the one hand to reduce the demand,(h) or, on the other, to increase the rate of charges ;(i) but he may obtain leave to carry in an additional bill of items accidentally omitted.(k) It has been recently held that under this act a country solicitor can procure the taxation of the charges of his town agent :(l) but it does not authorize the taxation of the fees of the steward of a manor, (who is a solicitor,) in respect of matters in which he acts only as a steward.(m)

\*And the court may, under its general jurisdiction, order taxation of a bill consisting wholly or in part of conveying costs, if the solicitor refuse to deliver up deeds and papers in his possession except upon payment of the bill.(n)

[\*343]  
Taxation ordered under general jurisdiction if solicitor claim a lien on papers for his costs.  
Costs of conveyance un-

Lastly, under this head, we may remark that the 8 and

(d) See *In re Jones*, 8 Beav. 479 ; *In re Fyson*, 9 Beav. 117 ; *In re Big-nold*, 9 Beav. 269 ; *In re Harrison*, 10 Beav. 57.

(e) *In re Bennett*, 8 Beav. 467.

(f) *In re Downes*, 5 Beav. 425 ; *In re Massey*, 8 Beav. 458.

(g) *Re Becke and Flower*, 5 Beav. 406.

(h) *In re Carven*, 8 Beav. 436.

(i) *S. C.*, and *In re Wells*, *ib.* 416 ; *In re Walters*, 9 Beav. 299.

(k) *In re Walters*, *ubi supra*.

(l) *Smith v. Dimes*, 13 Jur. Exch. 518.

(m) *Allen v. Aldridge*, 5 Beav. 401.

(n) *In re Murray*, 1 Russ. 519 ; *In re Rice*, 2 Keen, 181.

## Chap. XIII

der 8 and 9  
Vict. c. 119  
to be taxed  
solely with  
reference to  
skill, labor,  
and responsi-  
bility.

9 Vict. c. 119, (o) enacts that in taxing any bill for preparing and executing any deed *under that act*, it shall be lawful for the taxing officer, and he is thereby required, in estimating the proper sum to be charged for such transaction to consider, not the length of such deed, but *only* the skill and labor employed, and responsibility incurred in the preparation thereof: an enactment which in principle is unexceptionable, but in theory throws a most heavy responsibility upon the taxing masters: it is, however, believed that their duties under the act have practically been hitherto far from onerous.

[\*344]

## \*CHAPTER XIV.

## AS TO THE EFFECT OF THE CONVEYANCE ON THE RELATIVE RIGHTS OF VENDOR AND PURCHASER.

1. *Vendor's lien on estate for unpaid purchase-money.*
2. *Whether he has any remedy if estate has been sold at under value: or more has been conveyed than was intended.*

3. *His right of pre-emption under Lands Clauses Consolidation Act, 1845.*

4. *His remedies at law and in equity on purchaser's covenants.*

5. *Purchaser's remedies on vendor's covenants.*

6. *His remedy in equity under special circumstances if title defective.*

7. *His right to pay off incumbrances out of purchase-money.*

8. *His remedy in equity if he buy his own estate, &c.:—or if lands are omitted from conveyance—and as to further assurance in equity and by statute.*

9. *As to his general rights and liabilities under the conveyance.*

(1.) THE conveyance, if purporting to comprise "all

(o) As to which, *vide supra*, p. 247.

the estate and interest" of a conveying party in the pro- Chap. XIV.  
 perty, will not be restricted in its operation by the circum-  
 stance of his having concurred therein in any particular  
 and specified character.(a)

In the absence, however, of an express agreement, and  
 of those circumstances from which the court can imply  
 \*an intention to the contrary, the vendor, notwithstanding  
 the execution of the conveyance which contains the above  
 expressions and acknowledges payment of the purchase-  
 money and bears an indorsed receipt for the amount, and  
 notwithstanding delivery of possession to the purchaser,  
 retains an equitable lien(b) upon the estate, whatever may  
 be its tenure, for all or such part of the purchase-money  
 as in fact remains unpaid:(c)[1] and such lien is valid  
 against volunteers, creditors, (whether claiming under a  
 composition deed, or in bankruptcy),(d) and sub-purcha-  
 sers with notice, claiming under the first purchaser:(e)  
 and a sub-purchaser, even without notice, is postponed  
 unless he has the legal estate,(f) or, (in the opinion of  
 Sir E. Sugden),(g) the deeds: it has even been held, in  
 a recent case, that a sub-purchaser or mortgagee acquir-  
 ing the legal estate, but neglecting to ask for the deeds,

Vendor's  
 lien off estate  
 for unpaid  
 purchase-  
 money.  
 [345]

Lien is valid  
 as against  
 whom.

(a) *Drew v. Earl of Norbury*, 3 Jo. & Lat. 267.

(b) As to the distinction between the vendor's lien and the right of stop-  
 page *in transitu* on a sale of personal chattels; see *McEwan v. Smith*, 2  
 H. L. C. 309.

(c) See *Winter v. Lord Anson*, 3 Russ. 488; and see the judgment in  
*Mackreth v. Symmons*, 15 Ves. 336, where the earlier cases are cited.

(d) See *Fawell v. Heelis*, Amb. 724; *Blackburn v. Gregson*, 1 Bro. C. C.  
 420; *Bowles v. Rogers*, cited 6 Ves. 95.

(e) 15 Ves. 337, 341.

(f) See *Mackreth v. Symmons*, 15 Ves. 329.

(g) Sug. 881; but see *Manningford v. Toleman*, 1 Coll. 670, *et qu.*

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[1] See *Cole v. Scott*, 2 Wash. Rep. 141; *McTears' lessees v. Buttorf*, 4  
 Yeates, 300; *Kennedy v. Woodfolk*, 3 Hayw. 197; *Cox v. Fenwick*, 3 Bibb,  
 183; *Hatcher v. Hatcher*, 1 Rand. 53; *Ridgely v. Carey*, 4 Har. & M'Hen.  
 167; *Garson v. Green*, 1 John. Ch. Rep. 308; *Gilman v. Brown*, 1 Mason's  
 Rep. 192; *S. C.*, 4 Wheat. 255; *Irvine v. Campbell*, 6 Binn. 118; *Williams*  
*v. Price*, 5 Munf. Rep. 507; *Stonfer's lessee v. Coleman*, 1 Yeates, 393;  
*White v. Cassanave*, 1 Har. & Johns. 106.

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is to be postponed to the original vendor who holds them as a security for his unpaid purchase-money. (h)[2]

(A) *Worthington v. Morgan*, 16 Sim. 547.

[2] The vendor of land has a lien on the land, for the amount of the purchase-money, not only against the vendee himself, and his heirs and other privies in estate, but also against all subsequent purchasers having notice that the purchase-money remains unpaid. *Garson v. Green*, 1 John. Ch. Rep. 308; *Champion v. Brown*, 6 John. Rep. 402, 403; *Bayley v. Greenleaf*, 7 Wheat. Rep. 46; *McLearn v. McLelland*, 10 Peters' Rep. 625. To this extent, the vendee becomes a trustee for the vendor; as do also his heirs, and all other persons claiming under them, with such notice. The vendor's lien attaches to the estate equally, whether it be actually conveyed, or only be contracted to be conveyed. It has been said that the creation of such a trust is opposed to the statute of frauds. "But," says Story, (2 Story's Eq. Juris., sec. 1218,) "whatever may be the original force of such an objection, the doctrine is now too fairly established to be shaken by any mere theoretical doubts. Courts of equity have proceeded upon the ground, that the trust being raised by implication, is not within the purview of that statute; but is excepted from it. It is not, perhaps, so strong a case as that of a mortgage implied by a deposit of the title deeds of real estate which seems directly against the policy of the statute, but which, nevertheless, has been unhesitatingly sustained. The principle upon which courts of equity have proceeded in establishing this lien, in the nature of a trust, is, that a person who has gotten the estate of another ought not, in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money. A third person, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it, without making such payment; for it attaches to him also, as a matter of conscience and duty. It would otherwise happen that the vendee might put another person into a predicament better than his own, with full notice of all the facts."

The burden of proof is on the purchaser to establish, that in the particular case, the vendor's lien has been intentionally displaced, or waived by the consent of the parties. *Garson v. Green*, 1 John. Ch. Rep. 308, 309. The difficulty lies in determining what circumstances are to be deemed sufficient to repel or displace the lien, or to amount to a waiver of it. This is left in such a state of uncertainty, that Lord Eldon, in *Mackreth v. Symmons*, 15 Ves. 340, did not hesitate to say that it would have been better at once to have held that the lien should exist in no case, and that the vendor should suffer the consequences of his want of caution; or to have laid down the rule the other way, so distinctly that a purchaser might be able to know, without the judgment of a court, in what cases it would, and in what it would not exist. If, upon the face of the conveyance, the consideration is expressed to be paid, and even if a receipt therefor is indorsed upon the back of it, and yet, in point of fact, the purchase money has not been paid, the lien is not gone; but it attaches against the

## RIGHTS OF VENDOR AND PURCHASER.

If, however, the vendor, having conveyed the estate to the purchaser, retain the title deeds, the latter can recover them at law, notwithstanding that the purchase-money be unpaid, unless the conveyance has been executed as an escrow, to be delivered on payment of the money.(i)

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Does not protect title deeds at law.

The lien is not in the nature of an "express trust" \*within the 25th sec. of the 3 and 4 Will. IV. c. 27; and is therefore barred by the 40th section after twenty years from the day fixed for payment; there having been no interim payment nor written acknowledgment of title.(k)

Is not in nature of an express trust.  
[346]

(i) *Good v. Burton*, 11 Jur. 851, in which see the remarks made by the court upon Mr. Justice Holroyd's dictum in *Esdaile v. Oxenham*, 3 B. & C. 229.

(k) *Tuft v. Stephenson*, 7 Ha. 1.

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vendee and all persons claiming as volunteers, or with notice under him. 2 Story's Eq. Juris., sec. 1225.

In the case of a particular assignment to specified creditors, for their particular security or satisfaction, if a conveyance of the property has been actually made, and they have no notice of the purchase-money being unpaid to the vendor, they are deemed entitled to the same equities as any other *bona fide* particular purchasers. *Mitford v. Mitford*, 9 Ves. 100; *Bayley v. Greenleaf*, 7 Wheat. Rep. 56, 57.

If the consideration of the conveyance is a covenant to pay an annuity to the vendor, and another covenant to pay a part of the money to third persons, the latter, not being parties to the conveyance, will not, generally, have any lien thereon for the payment of such money; for they stand in no privity to establish a lien. 2 Story's Eq. Juris., sec. 1233.

Where a lien covers several parcels of land, and the owner thereof subsequently conveys some of the parcels to different purchasers or incumbrancers, the general rule is that where there is a lien upon different parcels of land, for the payment of the same debt, and some of those lands still belong to the person who, in equity and justice, owes, or ought to pay the debt, and other parcels of the land have been transferred by him to third persons, his part of the land, as between himself and them, shall be primarily chargeable with the debt. If he has sold, or transferred different parcels of the land at different times, to different persons, as incumbrancers or purchasers, as between themselves, they are to be charged in the reverse order of the time of the transfers to them; in other words the parcels last sold are to be first charged to their full value, and so backwards, until the debt is fully paid. 2 Story's Eq. Juris., sec. 1233. Story, however, doubts whether this last position is maintainable upon principle. On the contrary, he thinks there is strong ground to contend that the original incumbrance or lien ought to be borne rateably between them, according to the relative values of the estates. "And so," he remarks, "the doctrine has been asserted in the ancient, as well as the modern English cases, on the subject. *Ib.*

## Chap. XIV.

Is assignable  
by parol.

Marshalling  
for lien.

Is lost by tak-  
ing independ-  
ent security.

It would appear to be assignable by parol,<sup>(l)</sup> but the assignee will take subject to any prior equitable incumbrances created by the vendor.<sup>(m)</sup>

And it appears to be the result of the modern authorities<sup>(n)</sup> that where the vendor's claim is satisfied out of the personal estate of a deceased purchaser, equity will, by marshalling the purchased estate and the personal estate, give the benefit of the vendor's lien to simple-contract creditors and legatees of the purchaser, if he have died intestate as respects the purchased estate; and to simple-contract creditors, but not to legatees, if the estate be devised.<sup>[1]</sup>

When the vendor takes an independent security for payment, this will, as a general<sup>(o)</sup> but not universal rule,<sup>(p)</sup> amount to an abandonment of the lien; as when he takes a security upon stock,<sup>(q)</sup> or a mortgage of another estate;<sup>(r)</sup> so, taking a mortgage of part of the sold estate is an abandonment of his lien as respects the residue;<sup>(s)</sup> and taking a mortgage upon the estate for a part only of the unpaid purchase-money, is an abandonment of the lien for the balance.<sup>(t)</sup><sup>[2]</sup>

(l) *Dryden v. Frost*, 3 Myl. & Cr. 670.

(w) *Lacey v. Ingle*, 2 Ph. 313; and see *Mangles v. Dixon*, 1 Mac. & G. 437.

(n) See Sug. 878, and cases cited.

(o) Sug. 862.

(p) 15 Ves. 348.

(q) *Nairn v. Prowse*, 6 Ves. 752.

(r) See 6 Ves. 760.

(s) *Capper v. Spottiswoode*, Taml. 21.

(t) *Bond v. Kent*, 2 Vern. 281.

[1] So, if a subsequent incumbrancer or purchaser from the vendee is compelled to discharge the lien of the vendor, he will, in like manner, be entitled to stand substituted in his place, against other claimants under the vendor on the estate, and to have the assets marshalled in his favor. 2 Story's Eq. Juris., sec. 1227.

[2] The taking of a security for the payment of the purchase-money, is not, of itself, a positive waiver or extinguishment of the lien. It has been deemed, at most, no more than a presumption, under some circumstances, of an intentional waiver of the lien; and not as conclusive of the waiver. And, if a security is taken for the money, the burden of the proof lies on the vendee to show that the vendor agreed to rest on that security, and to



But he will not be held to have abandoned his lien from the sole fact of his taking any document which merely evidences, or facilitates the enforcement of his claim \*against the purchaser; *e. g.* a promissory note, or bill of exchange, or bond: (u) nor is it material that the money is to remain unpaid for a specified period, *e. g.* the life of the vendor. (v)

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But not by taking note, bill, or bond; [347] although payment agreed to be deferred.

And as promissory notes and bills of exchange are considered merely as a mode of payment, (w) it seems that if a third person join in them as surety, this will not affect the lien. (x) [1]

or third parties join in note or bill.

Whether the lien would be affected by taking a bond or covenant from a third person, appears to be undecided; (y) but probably such would be the case. (z) [2]

Whether affected by surety joining in bond.

(u) *Winter v. Lord Anson*, 3 Russ. 488, 490.

(v) *S. C.*

(w) 15 Ves. 349; see *Teed v. Carruthers*, 2 Y. & C. C. C. 31.

(x) *Hughes v. Kearney*, 1 Sch. & Lef. 132, 136; *Grant v. Mills*, 2 Ves. & B. 306.

(y) 2 Ves. & B. 309.

(z) *Cood v. Cood*, 10 Price, 109; Sug. 860.

discharge the land. Even the taking of a distinct and independent security has been deemed not to be conclusive evidence that the lien is waived. The taking of bills of exchange drawn on and accepted by a third person, or by the purchaser and a third person, has also been deemed not to be a waiver of the lien, but to be merely a mode of payment. And in general, where a bill, note, or bond is given for the whole or a part of the purchase-money, the vendor does not lose his lien for so much of the purchase-money as remains unpaid, even though it is secured to be paid at a future day, or not until after the death of the purchaser. 2 Story's Eq. Juris., sec. 1226.

[1] In this case, a receipt was given for the whole purchase-money, but part was retained, and a promissory note given for it, to a trustee for the vendor, there being debts affecting the estate, the amount of which was not ascertained. Held that it lay on the purchaser to show that the vendor agreed to vest on the collateral security. *Prima facie*, the purchase-money is a lien on the lands. In this case, the purchaser's note was nothing but a mere memorandum, put into the hands of a trustee, to enable the purchaser first to pay off incumbrances, and then to be subject to an account, and the balance only, to be received by the vendor. It could not be considered that the vendor relied on it as a security. Suppose bills given as part of the purchase-money, and suppose them drawn on an insolvent house, shall the acceptance of such bills, discharge the vendor's lien? They are taken, he added, not as a security, but as a mode of payment.

[2] In this case, a purchaser borrowed part of the purchase-money of a

Where the sale was expressed to be made in consideration of the purchaser's subsequent covenant to pay an annuity and a gross sum of 3000*l.* in the event of his own marriage, there was held to be no lien upon the estate for the 3000*l.* : (a)[3] upon this decision it may be remarked,

(a) *Clarke v. Royle*, 3 Sim. 499.

third person, which he paid to the seller, and all parties joined in a deed which stated the transaction, and by which the purchaser gave a security on the estate to the lender, for the money advanced. Held that by the assent of the seller to this transaction, he lost his lien, at least as against the mortgagee. And in the same case, it appeared that several persons agreed to join with the purchaser in bonds to secure the residue of the purchase-money, and the agreement was recited, and they were made parties to the deed executed upon the sale, although it is not stated in the report whether they entered into any covenant by the deed. It is not clear that the court decided this further point, but it remarked that there was this material difference in the facts, between this case, and those in *Mackreth v. Symmons*; there the bond was taken by the original seller of the estate, from the purchaser alone; here he took a bond with sureties. There seems to be but little doubt, that if the court did not decide that no lien existed, it would have so decided, if the question had been properly before it.

[3] In the case of *Clarke v. Royle*, which is here cited, the conveyance recited a contract by A. to convey to B., in consideration of the latter entering into covenants for payment to A., during his life, of an annuity of 60*l.*, and also, of his entering into the other covenants after contained, and then, in consideration of these covenants; A., the owner, conveyed the estate to B. in fee; and B. covenanted with A. to pay him an annuity of 60*l.* for his life, and in case he, B., should marry, he, his heirs, &c. would pay, as A. should think proper, 3000*l.* unto a certain person named in the deed. And it was held that the purchaser had no lien for the annuity and that there was none for the 3000*l.* The vice chancellor said, here the parties expressly recite, that A. had agreed to convey the estates to B., in consideration of his entering into the covenant for payment of the annuity, and in consideration of his entering into the other covenant thereafter contained. So that the release states distinctly the two circumstances that form the consideration; and then it is witnessed, that in consideration of the covenants of B. in the indenture contained, A. conveys the premises to him. And then it is further witnessed, that in pursuance of the agreement on the part of B. for entering into such covenants, as aforesaid, &c. So that the deed plainly marks out that the consideration on the one side, was the conveyance of the estate, and on the other, the entering into the covenants. Then why was he to declare, that in respect of this annuity, and of the sum which was payable on a contingency, and which therefore never might be payable, there was to be a lien on the purchased estates? Why should he go farther than any of the cases that had been hitherto decided upon the subject of lien on purchased estates, and do that which

that the nature of the consideration, and the fact of a covenant being taken, furnishes strong arguments in favor of an intention to abandon the lien as respects the 3000*l.*; for the existence of a lien for a gross sum, the payment of which might remain contingent during the life of the purchaser, and which depended upon an event the probabilities of which were not matters of calculation and which could not have been guarded against by any scheme of insurance, would have left the estate in his hand inalienable except at a most serious sacrifice.

the sum being payable upon an incalculable contingency.

So, where a daughter, on the eve of marriage, sold to her father her reversion of an estate, and the conveyance

Or if conveyance expressly in consideration.

appeared to be contrary to the intention of the parties? He considered that this case, was decided by the authority of *Winter v. Lord Anson*. When this case was decided, it seems not to have been known that *Winter v. Lord Anson*, had been reversed, and therefore, was no longer an authority in support of the view taken by the court; and it has been supposed to follow, that the case of *Clarke v. Royle*, was not itself, an authority.

As to this matter, Sugden (Sug. on Vend. vol. 3, p. 120) says: "The fault in the reasoning of the vice chancellor, appears to be, that he placed the case upon grounds which did not exist. He put it, as in effect, a case, where the conveyance was in consideration of a covenant in a deed to pay the price at the future period. But although the conveyance was in pursuance of the agreement, yet it did not refer to it, and his reasoning therefore, would apply to nearly every case; for, in general, the agreement to take a bond, or other security, precedes the conveyance, although in the latter the money is expressed to be paid. Indeed the agreement in *Winter v. Lord Anson*, was to accept a bond and not a covenant. But this would not shake the decision in *Clarke v. Royle*; for there, the very case arose which was assumed to exist in *Winter v. Lord Anson*. The conveyance really was made in consideration of covenants entered into by the same deed for payment of the price; and it may be considered against the bearing of such a security for the purchase-money, to raise another upon the estate itself, by implication from the very transaction. There is a marked distinction between a conveyance as for money paid, with a separate security for the price, whether by covenant, bond, or note, and a conveyance expressed to be in consideration of covenants, which the purchaser enters into by the deed itself. The price too, might never become payable, and it appears not to have been strictly a sale, for no sale is recited, and the two parties bore the same surname, and the 3000*l.* was only to be payable, in case the man to whom the estate was conveyed, married, and then, not to the former owner, but, although by his direction, to third persons evidently relations. It was partly in the nature of a purchaser, and partly a family transaction, and the learned judge appears to have come to a just conclusion, which the reversal of the original decree in *Winter v. Lord Anson*, does not seem to disturb."

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tion of a  
bond.

[\*348]

was expressed to be in consideration of the sum of 3000*l.* secured to her upon the terms mentioned in a bond of \*even date, and the indorsed receipt was for "a bond for the sum of 3000*l.*, being the full consideration within expressed to be given;" the bond being in fact for securing to her an annuity of 100*l.* during the joint lives of herself, her husband and father, and for payment of a sum of 3000*l.* in certain contingencies depending upon lives and the existence of issue, and subject to a proviso avoiding the bond (as regarded the 3000*l.*) in the event of the father by deed or will making a certain specified provision for his daughter or her husband, it was held that no lien upon the estate was intended to or did exist.(b)[1]

Whether af-  
fected by  
mere fact of  
conveyance  
being in con-  
sideration of  
a covenant  
or bond;

or if bond be  
for securing  
purchase-  
money upon  
an incalcula-  
ble contin-  
gency.

Bond for se-  
curing pay-  
ment on cal-  
culable con-  
tingency, lien  
not affected:  
semble.

The last two decisions, it is submitted, hardly establish that the lien would be discharged by the mere fact of the conveyance being expressed to be made in consideration of a bond or covenant for payment of a gross sum in all events; the sum being in fact so made payable; indeed, *Parrott v. Sweetland* appears to have been considered rather as a case of family arrangement than an ordinary transaction between vendor and purchaser;(c) and *Clarke v. Royle* partook of the same character; they may, however, it is conceived, induce a doubt whether *Winter v. Lord Anson*(d) would be an authority for the existence of the lien where a vendor takes a bond for a future consideration payable upon incalculable contingencies.

If, however, the consideration be payable upon a calculable contingency, it appears that taking a bond or covenant for its payment would not affect the lien; this

(b) *Parrott v. Sweetland*, 3 Myl. & K. 655.

(c) See 3 Myl. & K. 664.

(d) 3 Russ. 488.

[1] Upon an appeal in this case, the decree was affirmed, upon the ground, that the husband was content to accept the bond, as the fortune of his wife—that it was a sort of family arrangement—that the receipt was for the bond, and not for the 3000*l.* and the parties were bargaining for a security and not for a stipulated sum, and no question of lien arose, because the purchaser had actually received the consideration, that is, she was, in effect, paid by the receipt of the bond.

conclusion seems to be warranted by those cases upon Chap. XIV. sales in consideration of an annuity next adverted to.

The authorities seem to show, that, in the absence of special circumstances, a vendor who sells in consideration of even a life annuity, retains a lien upon the estate, although he take a bond or covenant for payment; this \*was decided in *Tardiffe v. Scrugan*; (e) a case which, [349] although doubts have been entertained respecting it, (f) is considered by Sir *E. Sugden* to be an authority; (g) and his opinion has been recently followed by Sir *James Wigram*, V. C., (h) who, however, in some degree grounded his decision upon the circumstance of the purchaser having covenanted with the vendor to uphold the property.

Where, however an equity of redemption was sold in consideration of two annuities, which were granted and covenanted to be paid by a deed of even date with the conveyance, and the conveyance was expressed to be made by the mortgagor and mortgagee in consideration of the annuities having been so granted, and of the mortgage debt having been paid by the purchaser, it was held, that the circumstance of the separate deed being taken as a security for the annuities, and the statement of the consideration in the conveyance, evidenced an intention that there should be no lien upon the estate. (i)

So, where a reversion was sold in consideration of immediate life annuities, which were secured by bond, it was considered by Lord Eldon, that the nature of the estate, and the fact of a bond being taken, showed that the parties did not intend the lien to subsist; the annuities might all determine before the reversion fell into possession; and this, coupled with the fact of the purchaser taking the bond, showed that he did not intend the lien

Lien for annuity consideration, is not affected by bond;

except under special circumstances, e. g., annuity granted by distinct deed.

Whether affected by bond in case of sale of reversion.

(e) Cited 1 Bro. C. C. 423.

(f) See 15 Ves. 352; 3 Sim. 502; but see 13 Sim. 412.

(g) Sug. 870.

(h) *Matthews v. Bowler*, 6 Ha. 110.

(i) *Buckland v. Pocknell*, 13 Sim. 406.

Chap. XIV. on the reversion to subsist : (k) [1] but the decision is disapproved of by Sir E. Sugden. l. [2]

(i) See *Mackrell v. Symonds*, 15 Ves. 351.

(j) Sug. 569. and note. that the same objections to the existence of the lien existed in *Parrott v. Scotland* *ubi supra*, which was a case of a sale of a reversion in consideration of an annuity and a gross sum.

[1] The facts of this case were these :—A. was indebted to B. upon bond, in which C. joined as a surety for A. A. had also granted annuities secured by bonds, in which C. had also joined as a surety. In the result, a value was put upon the annuities, and it was agreed between A. the debtor and grantor, and C. his surety, that the latter should pay the debt, and keep down the annuities, and give an indemnity against them, and that A. should pay to C. the amount of the debt, and the valuation of the annuities to be secured by a mortgage; so that they agreed to change situations, C. to be the principal, and A. to be the surety. C. gave a bond to A. to indemnify him against the annuities, and A. executed a mortgage in fee to C. to secure the sums agreed upon; so that the estate was made a security to C. for the debts he had agreed to pay, and the value of the annuities, just as if he had paid them. Afterwards, A. sold the reversion in fee of his estate, after his own life, to C., at a price composed of the principal and interest secured by the mortgage; and the estate was conveyed by him to the use of himself for life, remainder to C. in fee. Shortly afterwards, A. and C. joined in the conveyance to a third party, to secure annuities to a large amount, and there was no mention of any intention that A. should have a lien. C. did not pay the debt, nor did he keep down the annuities. And the question was, whether there was a lien on the estate for the debt or annuities. Lord Eldon relied upon the circumstance of silence as to the debt, and the indemnity taken against the annuities, which he considered very important; he was persuaded that A., in regard to the annuities, intended to rely entirely upon C.'s personal security, and that that was the conception of C. also. He thought it material that the purchase was of the reversion only expectant upon A.'s life. The value agreed to be given for the annuities, must have varied from time to time. It was impossible; it was not natural to suppose that A., selling to C. for the price of annuities, the reversion which might not take effect in possession, until all the annuitants were dead, relied on that reversion, in addition to the indemnity by the bond given by C. for the price which was originally secured by mortgage to C., as if actually paid. He considered it difficult to ascertain for what sum the lien should be; it could not, in justice, be for the original sum. Was it, he asked, for future payments, in which case one sum being paid, it would not attach; another sum not being paid, it would attach; a charge upon the reversion arising accordingly, as these payments were or were not made? Lord Eldon thought that such an inference could not be drawn, because

[2] Sugden (3 Sug. on Vend. p. 129) remarks, "There was great difficulty in the way of Lord Eldon's opinion, for he admitted that the inten-

\*And it was decided, in the same case, by Lord Eldon, that the nature of the transaction may show that the lien

Chap. XIV.

Lien may subsist as to only part of unpaid money.

the conveyance was executed without the least notice of such an intention; and although the security taken was not of itself sufficient to exclude the purpose of such a lien, yet the nature of the subject, connected with the fact of that security taken, was decisive proof against such an intention, and accordingly A. and C. joined in conveying to the third party to secure annuities, without the least reference to such an intention.

tion was the same, both as to the debt and the annuities, but with regard to the former he thought the law well settled, and he established the lien to that extent. Now, as to the annuities, there seems to have been no real difficulty in regard to the sum for which the lien ought to have been, if one had existed, for as between A. and C. the value was an agreed sum, *which formed part of the purchase money*; and the lien, therefore, would properly have been for that sum, although that sum would have been a security only for the amount of the annuities unpaid. The nature of the subject, viz., an annuity, presents no more difficulty in raising a charge for it by lien, than in securing it by an express charge. The apparent difficulty from a bond being taken for the annuities and none for the debt, is readily explained by the circumstance that C., the purchaser, was expected to pay the debt at once, according to his undertaking, whereas the annuities were necessarily a continuing incumbrance, and therefore a bond was taken against them; but a bond does not discharge the lien. The reversion was not a fitter security for the debt than for the value of the annuities; it was only available for either by a sale, but it was more likely, if not sold, to become available in possession, for continuing incumbrances, like annuities, than for a present debt. When the bond was given, it is clear that the lien in effect existed, or, in other words, that the estate in the hands of C., as mortgagee, would have been bound to answer the annuities, or if A. paid them, C. could not recover the mortgage money. For the case was simply this: A. mortgaged to C. for a sum the agreed value of the annuities, and C., who was to pay the annuities, gave a bond of indemnity. If the transaction had stopped there, and C. had not paid the annuities, he could not have recovered the value of them under his mortgage, for he had not paid the money or the annuities, and therefore was not a mortgagee for the amount. Now, when the mortgage was turned into a purchase, the lien for the debt was held to remain, and why not, for the value of the annuities? As a mortgagee, C. was a purchaser, *pro tanto*. Was the lien to cease because he became wholly the purchaser? The consideration still remains unpaid, and no intention was expressed to alter the relation of the parties as to the security for the sums due, and yet, according to the opinion expressed, A. returned his lien for the debt only, but lost his lien or security, for the value of the annuities. It may therefore be doubted whether Lord Eldon came to the best conclusion in *Mackreth v. Symmons*; but he did not express his intention to overrule *Tardiff v. Scrughan*; and an examination of the grounds of the opinion expressed by Lord Eldon, would seem to show that that case is capable of being supported upon principle."

Chap. XIV. is to subsist as to part of the unpaid purchase-money, but not as to the residue.

Presumable intention either way may be rebutted.

And as taking a substantive and independent security destroys the lien, not by virtue of any technical rule but merely by indicating the intention of the vendor, the lien may, notwithstanding the security, be preserved, either by express agreement, or by any expressions negating the presumable intention to abandon it; *e. g.*, a stipulation that the estate shall not be sold until the money is paid, or with the consent of the vendor and the surety :*(m)*[1] and, on the other hand, the intention to abandon the lien in cases where only a note or bond is taken, may be evidenced by a parol express agreement *(n)* or by any expressions inconsistent with its continuance; *e. g.*, expressions referring to a resale of the property before the time fixed for payment of the amount due to the vendor.*(o)*

Lien, how lost as against third parties.

Where a vendor joined in a deed by which the purchaser mortgaged the estate to a third party who advanced part of the purchase-money, he, of course, was held to have, as against such mortgagee, no lien for the unpaid balance :*(p)*[2] so, where, upon a purchase by trustees, the

*(m)* *Elliott v. Edwards*, 3 Bos. & P. 181.

*(n)* 1 Sim. & St. 445.

*(o)* See *Ex parte Parkes*, 1 G. & J. 228.

*(p)* *Cood v. Pollard*, 9 Pri. 544.

[1] In the case here cited, the vendor assigned a leasehold estate to the purchaser, upon payment of part of the purchase money. The purchaser and another person as his surety, covenanted by the assignment for payment of the residue of the purchase money; and in the assignment was contained a proviso, that the estate should not be assigned until all the money was duly paid, without the joint consent of the vendor and the surety. Lord Alvanley was of opinion that the vendor had an equitable lien, and that till the money was paid, equity would not compel a specific performance of any agreement by the assignee for sale of the estate. The purchaser and his surety, for themselves and their assigns, covenanted for the payment of the money, and there was a proviso that the purchaser should not assign until that money had been paid without the consent of the seller and the surety. Did not that, he asked, create an equitable incumbrance? He thought that a court of equity would hold it so, though he did not know that it would be binding at law.

[2] In the same case, it appeared that several persons agreed to join with the purchaser in bonds, to secure the residue of the purchase money,



## RIGHTS OF VENDOR AND PURCHASER.

vendor, knowing the money to be trust money, signed the usual indorsed receipt, but allowed part of it to remain in the hands of one of the trustees without the knowledge of his co-trustees, or *cestuis que trust*, he was held to have no lien on the estate.(g)

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And no lien will be assumed in favor of parties who are, by law, disqualified from holding such an interest in real estate.(r)

None implied in favor of disqualified parties.

\*A vendor's lien can only be enforced by suit in equity; and he cannot, at the same time, sue in equity, and bring an action at law upon any bond or other security which he may have taken for payment of the money; but if he fail in one remedy he may resort to the other.(s)

[\*351]

Lien merely equitable; vendor cannot at once sue at law and in equity.

Where the vendor conveys the estate to the purchaser, and takes a reconveyance, by way of mortgage, for securing payment of part of the purchase-money, his lien appears to render the existence of judgments against the purchaser immaterial.

Is a protection against purchaser's judgment-creditors, when purchase-money remains on mortgage.

A vendor, having given the usual release in the body of the conveyance for the purchase-money, cannot bring an action for interest which has been omitted to be paid through an error of calculation.(t)[1]

Vendor has no claim for miscalculated interest.

(g) *White v. Wakefield*, 7 Sim. 401.

(r) *Harrison v. Southcole*, 2 Ves. 389, 393; and see 15 Ves. 337.

(s) *Barker v. Smark*, 3 Beav. 64.

(t) *Harding v. Ambler*, 3 Mee. & W. 279.

and the agreement was recited, and they were made parties to the deed executed upon the sale, although it is not stated in the report whether they entered into any covenant by the deed.

[1] See *Oneale v. Lodge*, 3 Har. & M'Hen. 433; *Hamilton v. M'Guire's ex'rs.*, 3 Serg. & Rawle, 355; *Jordon v. Cooper*, 3 Serg. & Rawle, 564, 570; *Weigley's adm'r. v. Weir*, 7 Serg. & Rawle, 309; *Wilkinson v. Scott*, 17 Mass. Rep. 259; *Shepherd v. Little*, 14 John. Rep. 210; *Bowen v. Bell*, 20 John. Rep. 338; *Pritchard v. Brown*, 4 N. H. Rep. 379; *Morse v. Shattuck*, 4 N. H. Rep. 229; *Hutchinson's adm'r and heirs v. Sinclair*, 7 Monroe, 291, 293; *Gully v. Grubbs*, 1 J. J. Marsh. 388, 389, 390; *Spiers v. Clay's adm'r's.*, 4 Hawks, 22; *Graves v. Carter*, 2 Hawks, 576; *Smith v. Amis' ex'r.*, 3 Hawks, 469; *Dixon v. Swiggelt*, 1 Har. & John. 252; *Steele A. Adams*, 1 Greenl. Rep. 1; *Emery v. Chase*, 5 Greenl. Rep. 232; *Schermerhorn v. Vanderheyden*, 1 John. Rep. 139; *Maizeley v. Hayner*, 7 ib. 341; *Belden v. Seymour*, 8 Conn. Rep. 304; *Lingan v. Henderson*, 1 Bland's Ch. Rep. 249; *Whitson v. Blaine*, 13 Serg. & Rawle, 131, 137,

(2.) *Whether the vendor has any remedy if estate has been sold at an undervalue;—or more has been conveyed than was intended.*[2]

Nor in respect of mistake as to extent or value of the property;

The vendor, after conveyance, has no remedy, if the property prove to be, either as respects quantity or quality,

138; *Curry v. Lyles*, 2 Hill's Rep. 404; *Garrett v. Stewart*, 1 McCord's Rep. 514; *Steele v. Worthington*, 2 Ham. Rep. 182; *Clark v. Brown*, 1 Root's Rep. 77; *Hannah v. Wadsworth*, ib. 458; *Cone v. Tracy*, ib. 479; *Whilbeck v. Whilbeck*, 9 Cowen's Rep. 266, 270; *Swisher v. Swisher's adm'r.*, 1 Wright's Rep. 755, 756; *Goodwin v. Gilbert*, 9 Mass. Rep. 310; *Pomeroy v. Winskip*, 12 ib. 514; *Harvey v. Alexander*, 1 Rand. Rep. 219; *Eppear v. Randolph*, 2 Call's Rep. 103; *Jack v. Dougherty*, 3 Watts' Rep. 151; *Jones v. Sasser*, 1 Dev. & Batt. 452.

[2] There is a marked distinction between ignorance of law and ignorance of fact. It is a settled maxim that the former does not excuse; the law only aiding those who are negligent, and not those who slumber over their rights. But no person can be supposed acquainted with all matters of fact; neither is it possible by any degree of diligence, in all cases to obtain that knowledge. Consequently ignorance of a fact does not imply culpable negligence. And it seems, if a party has forgotten facts, he will be held excusable, because, under such circumstances, he acts under the like mistake, as if he had never known the facts. 1 Story's Eq. Juris. 140; 9 Mees. & Wels. 54, 58, cited.

To entitle the party to relief on the ground of ignorance or mistake of facts, the facts must be material to the act or contract. For though there may be an accidental ignorance or mistake of a fact, yet if the act or contract is not materially affected by it, the party claiming relief will be denied it. Hence, if A. were to sell an estate to B., whose location was well known to each, and they mutually believed it to contain twenty acres, and in point of fact, it only contained nineteen acres and three-fourths of an acre, and the difference would not have varied the purchase in the view of either party; and in such a case the mistake would not be a ground to rescind the contract. Ib. sec. 141; *Smith v. Evans*, 1 Binn. Rep. 102; *Mason v. Pearson*, 2 John. Rep. 37. Nor is the ground of relief, in such cases, the mistake, or ignorance of material facts alone; but the unconscientious advantage taken of the party by the concealment of them. If, therefore, A. knowing that there is a mine in the land of B., of which he knows that B. is ignorant, should buy the land without disclosing the fact to B. for a price, in which the mine is not taken into consideration, B. would not be entitled to relief from the contract, because A., as the purchaser, is not bound, from the nature of the contract, to make the discovery. To set aside such a transaction, there must be some legal obligation in the party, to make the discovery. The contract will not be corrected merely because a man of nice morals and honor would not have entered into it. It must fall within some definition of fraud or surprise. "It would appear," says Kent, (2 Kent's Com. p. 490, 491,) "that human laws are not so perfect as the dictates of conscience; and that the sphere of morality is more enlarged than the limits of civil jurisdiction. There

more valuable than was imagined ; for instance, where the residue of a lease, of which twenty years were in fact unexpired, was sold under the impression that only eight years were to run, and the price was fixed on that supposition, the vendors, although trustees, were held bound by the conveyance : Lord Cottenham, in affirming the decree of V. C. Knight Bruce dismissing the vendors' bill, observed, "Suppose a party proposed to sell a farm, describing it as 'all my farm of 200 acres,' and the price was fixed on that supposition ; but it afterwards turned out to be 250 acres, could he afterwards come and ask for

are many duties that belong to the class of imperfect obligations which are binding on conscience, but which human laws do not and cannot undertake, directly to enforce. But when the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway. And a purchase made with such a reservation of superior knowledge, would be of too sharp a character to be aided and forwarded in its execution, by the powers of the court of chancery. It is a rule in equity, that all the material facts must be known to both parties, to render the agreement fair and just in all its parts ; and it is against all the principles of equity, that one party knowing a material ingredient, in an agreement should be permitted to suppress it, and still call for a specific performance."

If the vendee is in the possession of facts which will materially enhance the price of the commodity, and of which he knows the vendor to be ignorant, he is not bound to communicate those facts to the vendor, and the contract will be held valid. A like principle applies to cases where the fact is equally unknown to both parties, or where each has equal and adequate means of information, or where the fact is doubtful from its own nature. Hence, where there was a contract by A. to sell to B. for £20, such an allotment as the commissioners, under an inclosure act, should make for him ; and neither party, at the time, knew what the allotment would be, and were equally in the dark to the value ; the contract was held obligatory, although it turned out upon the allotment, to be worth £200. 1 Story's Eq. Juris. sec. 148, 149, 150.

"The general grounds," says Story, (1 Story's Eq. Juris. sec. 151.) "upon which all these distinctions proceed, is that mistake or ignorance of facts in parties, is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a natural error ; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts, which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. It is strictly *Damnum absque injuria*."

Chap. XIV. a reconveyance of the farm or payment of the \*difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or larger acreage is immaterial."<sup>(u)</sup>

or the extent  
of his inter-  
est therein.

Nor, where several persons have joined in conveying an estate to a purchaser for a full consideration, can one of them be afterwards be heard to say that he was under a misapprehension as to the extent of his interest in the property.<sup>(v)</sup>

Aliter, if  
property not  
intended to  
be dealt  
with is con-  
veyed.

But the above cases must be distinguished from those where the conveyance, by mistake, comprises more than either party intended to deal with;<sup>(w)</sup> as if, upon a contract for sale of farm A., the conveyance were by mistake to include lands parcel of farm B.; the difference between the cases is this, viz., that in the latter the parties never intended to deal with the property which was conveyed; while, in the former,<sup>(x)</sup> "the vendors did intend to sell all their remaining interest in the lease, but by their own mistake they misdescribed what that interest was":<sup>(y)</sup> so, in the case put by Lord Cottenham, the vendor would really intend to sell the entire farm, and the only mistake would be as to the quantity. We may here remark, that at law, evidence cannot be received to contradict the conveyance by showing that property, which would *prima*

(u) *Okill v. Whittaker*, 2 Phill. 338.

(v) *Malden v. Merick or Menil*, 2 Atk. 8; *Marshall v. Collett*, 1 Y. & C. 232; and see also *Sturge v. Starr*, 2 Myl. & K. 195, where a woman, who had a life interest settled to her separate use, joined with her supposed husband (who was in fact married to another woman) in assigning it to a purchaser, and was held bound by the assignment: as to which it is difficult to understand how any fair question could be raised, since the woman assigned the property not *qua a feme covert*, but as being in regard thereto, a *feme sole*, in contemplation of a court of equity.

(w) *Tyler v. Beversham*, Rep. t. Finch, 80; see *Beaumont v. Bramley*, Turn. & R. 41; *Marquess v. Marchioness of Exeter*, 3 Myl. & Cr. 321; *Mortimer v. Shortall*, 2 Dru. & W. 363.

(x) *Okill v. Whittaker*, *ubi supra*.

(y) 2 Phil. 341.

\**facie* pass under general words, was not intended to be included in the purchase.(z)[1] Chap. XIV.

If, however, the vendor, in fixing the price, have altogether relied upon information furnished to him by the purchaser, and such information turn out to have been (even unintentionally) materially incorrect, this, it appears, may entitle the vendor, even after conveyance, to have the contract set aside.(a) Or if vendor, in fixing price, rely on purchaser's information.

And the same relief has been afforded, where a purchaser knowingly obtained, for an inadequate consideration, a conveyance from a vendor in humble circumstances and ignorant of his rights,(b) and, in other cases, where advantage has been taken of the vendor's distress to procure an unfair bargain.(c) And in a case where a person, who well knew the value of the property, obtained from a young man, a common sailor, lately come ashore and much pressed for money, an estate for a grossly inadequate price, the court, even as against the devisees of the purchaser, appointed a receiver before the hearing.(d) Or if purchase were at under-value from vendor ignorant of his rights, or whose distress has been taken advantage of.

(z) *Doe d. Norton v. Webster*, 4 Per. & Dav. 270.

(a) *Carmichael v. Powis*, 11 Jur. 158; 10 Beav. 36.

(b) *Evans v. Llewellyn*, 2 Bro. C. C. 150; see *Groves v. Perkins*, 6 Sim. 576; and *Sturge v. Sturge*, 14 Jur. R. 159.

(c) See *Wood v. Abrey*, 3 Madd. 417; *Gordon v. Crawford*, and other cases, cited Sug. 313.

(d) *Stilwell v. Wilkins*, Jac. 280; see *Farmer v. Farmer*, 1 H. L. C. 724, where the vendor was deaf and dumb, but under the circumstances relief was refused.

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[1] Where there is a written agreement, it is presumed to embrace the whole sense of the parties; and it is against the policy of the common law, to add to or vary the terms of such an agreement. Courts of equity, however, will grant relief, upon clear proof of a mistake, notwithstanding the mistake is to be made out by parol evidence. There is certainly great danger in setting aside the solemn engagements of parties, when reduced to writing by the introduction of parol evidence, substituting other material terms and stipulations. But courts of equity have not hesitated to entertain jurisdiction to reform all contracts where a fraudulent suppression, omission, or insertion of a material stipulation exists, notwithstanding it, to some extent, breaks in upon the uniformity of the rule as to the exclusion of parol evidence, to vary or control written contracts, deeming such cases to be proper exceptions to the general rule. See 1 Story's Eq. Juris. sec. 154.

Chap. XIV. It was laid down by Lord *Langdale* in a recent case,<sup>(e)</sup>  
 General rule as to distress. that a man who is in distress may nevertheless contract ;  
 and if, being in distress, he procure other persons to consent to an agreement which he would not himself have requested or consented to if he had not been in distress, and afterwards successfully urges and obtains the performance of that agreement, and, after that, acquiesces for a length of time in the performance, without any notice \*of dissatisfaction or complaint, he is not entitled to set aside the transaction on the mere ground of his poverty or distress, in the absence of any deception or fraud proved to have been practised on him.

[\*354]

Inadequacy of consideration no general reason for setting aside conveyance.

We shall hereafter see<sup>(f)</sup> that, upon the purchase of an estate in possession, mere inadequacy of consideration, unless shown to be the result of fraud, surprise, misrepresentation, or improper concealment on the part of the purchaser, will be no defence even to a suit for specific performance, unless the inadequacy be so great as in itself to furnish evidence of fraud ;<sup>(g)</sup> and a stronger case than what would suffice as a defence to a suit for specific performance, would be necessary to enable the vendor to rescind the contract after conveyance.<sup>(h)</sup>[1]

Uncertain amount of purchase-money.

A distinction has been made between cases where the consideration was for a stated sum, and for an uncertain

(e) *Knight v. Marjoribanks*, 11 Beav., see p. 349.

(f) *Infra*, Ch. XVIII.

(g) See *Rice v. Gordon*, 11 Beav. 265.

(h) See Sug. 312, 314; *Vigers v. Pike*, 8 Cl. & Fin. 645; *Playford v. Playford*, 4 Ha. 546; *Bellamy v. Sabine*, 2 Ph. 425; *Wilde v. Gibson*, 1 H. L. C. 617. Lord Eldon seems to have entertained a different opinion, see *Coles v. Trecothick*, 9 Ves. 234.

[1] Inadequacy of consideration is not, of itself, a distinct principle of relief in equity. The consideration, be it more or less, supports the contract. The value of a thing is what it will produce; and it admits of no precise standard. It must be, in its nature, fluctuating, and it will depend upon a variety of considerations. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances, which may induce him to part with it at a particular time. Still, however, there may be such an inadequacy in a bargain as to demonstrate some gross imposition, or some undue influence; and, in such cases equity interferes on the ground of fraud. See 1 Story's Eq. Juris., secs. 245, 246.

amount, *e. g.*, a life annuity; but it seems doubtful whether this is sustainable.<sup>(i)</sup> Chap. XIV.

But there is a well recognized distinction between sales of estates in possession and estates in reversion; and on sales of the latter description, if effected by private contract, mere inadequacy of consideration will enable the court to decree a re-conveyance; and the *onus probandi* does not, as in ordinary cases, rest with the plaintiff seeking to impeach the sale, but with the defendant.<sup>(k)</sup> Distinction in cases of reversionary interests.  
  
*Onus probandi* lies on purchaser.

And this relief will be afforded where a small part of the property is in possession and the bulk is "reversionary";<sup>(l)</sup> but not where the tenant for life concurs with the immediate reversioner, so that the sale is, in effect, of an estate in possession;<sup>(m)</sup> nor where the sale is made by a vendor entitled to what is, substantially, an estate in possession, and to the ultimate reversion, subject only to an intervening life estate;<sup>(n)</sup> nor where the contract is entered into between a tenant and the person entitled to the reversion and to the rents during the term;<sup>(o)</sup> and relief will be more sparingly afforded where the reversion is subject to an almost incalculable contingency, as where it is expectant on the death, without issue, of a tenant for life aged sixty three and unmarried;<sup>(p)</sup> although the existence of such a contingency is no absolute protection to a purchaser at an undervalue.<sup>(q)</sup> [\*355]  
What interests are considered reversionary within the rule.

And the relief is afforded, as well to the mere owners Relief given to vendors of

(i) *Vide Infra*, Ch. XVIII.

(k) See *Coles v. Trecothick*, 9 Ves. 246; *Gowland v. De Faria*, 17 Ves., see p. 24; *Hinckman v. Smith*, 3 Russ. 433; *Kendall v. Beckett*, 2 Russ. & Myl., see p. 90; *Addis v. Campbell*, 1 Beav. see p. 268.

(l) *Lord Portmore v. Taylor*, 4 Sim. 183.

(m) *Wood v. Abrey*, 3 Madd. 417; see *Cooke v. Burtchall*, 2 Dru. & W. 165; and *Sibbering v. Earl of Balcarres*, 14 Jur. 753, V. C. K. B.

(n) *Wardle v. Carter*, 7 Sim. 490.

(o) *Scott v. Dunbar*, 1 Moll. 459.

(p) *Baker v. Bent*, 1 Russ. & Myl. 224; and see *Whickcote v. Bamston*, c.t.d 4 Sim. 202.

(q) See Sug. 325; *Addis v. Campbell*, 4 Beav. 401; *Davies v. Cooper*, 5 Myl. & Cr. 270; *Boothby v. Boothby*, 1 Mac. & G. 604; *Woodroffe v. Allen*, 1 H. & J. 73; father and son, when dealing with a third person, need not be represented by separate solicitors, *S. C.*; *Cooke v. Burtchall*, 2 Dru. & W. 165.

## Chap. XIV.

reversions as  
well as to ex-  
pectant heirs

Relief afford-  
ed as against  
sub-purcha-  
ser with no-  
tice notwith-  
standing vol-  
untary con-  
firmation by  
reversioner.

of reversionary interests, (r) as to heirs dealing with their expectancies; although an extraordinary protection is afforded to the latter class of vendors. (s)[1]

And where a person bought a reversion at a gross undervalue from an heir in distressed circumstances, and resold it at a large profit to a sub-purchaser who had full notice of the original fraud, and the reversioner being still in distress, joined in and confirmed the resale, but nothing was paid or secured to him as a consideration for such concurrence, the transaction was set aside as against the

(r) *Bawtree v. Watson*, 3 Myl. & K. 339; *Davies v. Cooper*, 5 Myl. & Cr. 270; *Edwards v. Browne*, 2 Coll. 100; see *Swell v. Walker*, 12 Jur. 1041.

(s) Sug. 314.

[1] "In treating of inadequacy of price," says Sugden, (Sag. on Vend. vol. 1, p. 321,) "we must be careful to distinguish the cases of reversionary interests, the rules respecting which, especially where an heir is the vendor, depend upon principles applicable only to themselves, and not easily definable. The heir of a family, dealing for an expectancy in that family, is distinguished from ordinary cases, and an unconscionable bargain made with him, is not only to be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed. There are two powerful reasons why sales of reversions by heirs should be discountenanced; the one, that it opens a door to taking an undue advantage of an heir, being in distressed and necessitous circumstances, which may perhaps be deemed a private reason: the other is founded on public policy, in order to prevent an heir from shaking off his father's authority, and feeding his extravagances by disposing of the family estate. Every case of this nature must, however, depend on its own circumstances; the courts profess not to lay down any particular rules, lest devices should be framed to evade them." See *Osgood v. Franklin*, 2 Johns. Ch. Rep. 25; *Boynston v. Hubbard*, 7 Mass. Rep. 112. In the case of *Butler v. Haskell*, 4 Des. Rep. 687, the chancellor remarked, "there is a distinction made between the cases of young heirs selling expectancies, and of others, which I am not disposed to support. It is said that the former are watched with more jealousy, and more easily set aside than others, on principles of public policy. This was certainly true at first; but the eminent men who have sat in chancery have gradually applied the great principles of equity, on which relief is granted, to every case where the dexterity of intelligent men had obtained bargains at an enormous and unconscientious disproportion, from the ignorance, the weakness and the necessities of others, whether young heirs or not." See *Fitch v. Fitch*, 8 Pick. Rep. 480.



\*sub-purchaser, on repayment of the price paid on the first purchase.(t) Chap. XIV.

It was laid down by the court in deciding a modern case,(u)[1] First, that this extraordinary protection must be withdrawn from the heir, "if it shall appear that the transaction was known to the father or other person standing in *loco parentis*, the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession, —even although such parent or other person took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. Secondly, that if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect, act upon it so as to alter the situation of the other party, or his property; at least that if he does so, the proof lies upon him of showing that he did so under the continuing pressure of the same distress which gave rise to the original dealing."

What circumstances will deprive the heir of his special protection—rules laid down in *King v. Hamlet*.

The first of these propositions is criticised by Sir E. Sugden, who observes that the equity is that of the son,(v) not of the parent; and in a late case(w) a purchase

Sir E. Sugden's comments thereon.

(t) *Addis v. Campbell*, 4 Beav. 401; but the case would be different if the sub-purchaser had no notice of the original fraud, even although he might not have acquired the legal estate; see *Nagle v. Baylor*. 3 Dru. & W. 60; see, too, *Sibbering v. Earl of Balcarres*, 14 Jur. 753, V. C. K. B.

(u) *King v. Hamlet*, 2 Myl. & K. see p. 473.

(v) Sug. 316.

(w) *Edwards v. Browne*, 2 Coll. 100; and see *Playford v. Playford*, 4 Ha. 546.

[1] In this case, the heir was not relieved, although after a treaty for a loan, goods to the value of 8000*l.* were sold at the shop prices to an expectant heir, who had sold his only immediate provision, and a mortgage and other securities were taken as upon an actual advance of 8000*l.* in money, carrying five per cent. interest from the time of sale, although it was proved that where ready money was paid, a rebate of five per cent. was allowed, in the ordinary way of trade, by the defendant, which would have amounted to 400*l.*; but no such allowance was made to the plaintiff, and his goods were detained until the securities were perfected. The goods were of course re-sold, and the plaintiff sustained a loss of about 60 per cent. upon the transaction.

Chap. XIV. was set aside upon the ground of inadequacy, the tenant for life being herself the purchaser: as to the second of the above propositions, Sir *E. Sugden* remarks, that without the concluding qualification it could not safely be acted upon.(x)[3]

[\*357]

Adequacy of consideration, how determined

\*The question of adequacy of consideration must be determined with reference to circumstances as existing at the date of the contract, and not to subsequent events:(y) it was formerly held(z) sufficient to avoid the transaction, that the price paid was not the estimated value according to the tables used by actuaries; but, subsequent decisions and authorities seem to have established the more reasonable doctrine, that the market value, (which is generally about two-thirds of the estimated value,(a)[1] is alone to

(x) *Sug. 316.* As to transactions in the nature of family arrangements between father (tenant for life) and son (tenant in tail,) see *Bellamy v. Sabine*, 2 Ph. 425; *Lord Aldborough v. Trye*, 7 Cl. & Fin. 436; *Cooke v. Burtch-aell*, 2 Dru. & W. 165; see also, as to family arrangements generally, *Farmer v. Farmer*, 1 H. L. C. 724; and *Persse v. Persse*, 7 Cl. & Fin. 279; *Westby v. Westby*, 2 Dru. & W. 502; such arrangements are exempt from the strict rules applicable to cases between ordinary vendors and purchasers: see a case of such an arrangement being set aside, *Sturge v. Sturge*, 14 Jur. 159.

(y) *Gowland v. De Faria*, 17 Ves. 20.

(z) *S. C.*; and see *Peacock v. Evans*, 16 Ves. 512.

(a) See *Potts v. Curtis*, You. 543.

[3] "The knowledge of the parent," says Sugden, (1 *Sug. on Vend.*, p. 323,) "may, under some circumstances, remove one of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, although his father may witness his ruin with indifference. It is the son's equity, although partly grounded on public policy. In many cases, the person standing in *loco parentis*, or from whom the *spes successionis* is entertained, or after whom the reversionary contract is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir. Even in the case of father and son, how frequently we find the expectant spendthrift only following his parent's example! The second rule, without the concluding qualification, could not be safely acted upon. In the case of goods substituted for money, and a security given over the buyer's reversionary property, the heir may offer to return the goods if the seller will relinquish the securities. If the offer is refused, and the heir then sell them, (which is simply accomplishing the purpose for which they were bought,) it would not be possible to maintain that he had forfeited any equity which he originally had to impeach the transaction."

[1] In the case here cited, the bill was to compel a transfer of some

be regarded : (b) and, on a *bona fide* sale by auction, its result is considered in itself to fix the market value. (c) In a late case, where the market value appeared to have been rather better than 1900*l.*, and the price paid was 1700*l.*, the court held, that the inadequacy was sufficient to entitle the vendor to relief. (d) Chap. XIV.

It was held in a modern case, that where goods are sold to a person in distressed circumstances by a tradesman, who knows that they are bought merely with a view to raise money by selling them again, and they are charged at fair and reasonable prices, and the purchaser, by way of security for the price, mortgages his reversionary interests as expectant heir, the court will not set aside the securities. (e) [2] \*In an earlier case, a bond, given for Security for price of goods bought to re-sell and so raise money supported. [358]

(b) *Lord Aldborough v. Trye*, 7 Cl. & Fin. 436; *Hinckman v. Smith*, 3 Russ. see p. 435; *Headen v. Rosher*, 1 M'Clel. & Y. 89; *Potts v. Curtis*, You. 543; *Wardle v. Carter*, 7 Sim. 490; see *Sewell v. Walker*, 12 Jur. 1041.

(c) *Shelly v. Nash*, 3 Madd. 232; *Fox v. Wright*, 6 Madd. 111; *Lord Aldborough v. Trye*, 7 Cl. & Fin. 436.

(d) *Edwards v. Browne*, 2 Coll. 100.

(e) *King v. Hamlet*, 2 Myl. & K. 456; 9 Bligh, 610; see Sir E. Sugden's remarks, Sugden's Law of Property, 65 *et seq.*

stocks, the reversion of which had been purchased by private contract by the plaintiff. The purchase was made in 1812 for 550*l.* The claim was assisted upon the allegation of undue advantage, which was abandoned, and inadequacy of consideration. The plaintiff examined two auctioneers, to prove the value. The defendant examined two actuaries, an auctioneer, and a land agent; and in the result, the purchase was supported. This case, for the first time, fairly introduced the question between the conflicting evidence of auctioneers and actuaries; or, in other words, between the market price of reversions, and their estimated price according to the tables.

[2] In this case, the heir was not relieved, although, after a treaty for a loan, goods to the value of 800*l.* were sold at the shop prices to an expectant heir, who had sold his only immediate provision, and a mortgage and other securities were taken as upon an actual advance of 800*l.* in money, carrying five per cent. interest from the time of sale, although it was proved that where ready money was paid (and here the security carrying interest was equal to ready money) a rebate of five per cent. was allowed, in the ordinary way of trade, by the defendant, which would have amounted to 400*l.*; but no such allowance was made to the plaintiff, and his goods were detained until the securities were perfected. The goods were of course re-sold, and the plaintiff sustained a loss of about 60 per cent. upon the transaction.

Chap. XIV. silks taken up to sell to raise money, was allowed to stand as a security only for the sum really raised ;(f) but the decision turned upon the transaction being a loan at usurious interest: the transfer of goods being a shift or cloak for usury.(g)

When sale fraudulent as against tenant in tail will be set aside at suit of remainderman whom

It would seem that where fraud has been practised on a tenant in tail, and has been carried into effect by barring the entail, and he dies without issue, and without confirming the transaction, the next remainderman may file

(f) *Barker v. Vansommer*, 1 Bro. C. C. 149.

(g) *Per* Lord Brougham, C., 2 Myl. & K. 485.

The court, in deciding this case, laid down two propositions as incontestible, as applicable to the doctrines of equity upon the subject of an expectant heir dealing with his expectancy. 1. That the extraordinary protection given in the general case must be withdrawn if it shall appear that the transaction was known to the father, or other person standing in *loco parentis*; the person, for example, from whom the *spes successionis* was entertained, or after whom the reversionary interest was to become vested in possession, even although such parent, or other person, took no active part in the negotiation, provided the transaction was not opposed by him, and so carried through in spite of him. 2. That if the heir flies off from the transaction, and becomes opposed to him with whom he has been dealing, and repudiates the whole bargain, he must not, in any respect act upon it, so as to alter the situation of the other party, or his property; at least, that if he does so, the proof lies upon him of showing that he did so, under the continuing pressure of the same distress which gave rise to the original dealing.

Sugden (3 Sug. on Vend. p. 323,) remarks that "the first of these rules is supported by no previous authority, and, as a general rule, cannot be maintained. The knowledge of the parent *may*, under some circumstances, remove one of the objections to such a transaction, but the others might still remain. The son is entitled to be relieved, although his father may witness his ruin with indifference. It is the son's equity, although partly grounded upon public policy. In many cases, the person standing in *loco parentis*, or from whom the *spes successionis* is entertained, or after whom the reversionary contract is to become vested in possession, may be more than indifferent about the worldly prospects of the expectant heir. Even in the case of father and son, how frequently we find the expectant spendthrift only following his parent's example! The second rule, without the concluding qualification, could not be safely acted upon. In the case of goods substituted for money, and a security given over the buyer's reversionary property, the heir may offer to return the goods, if the seller will relinquish the securities. If the offer is refused, and the heir then sell them—which is simply accomplishing the purpose for which they were bought—it would not be possible to maintain that he had forfeited any equity which he originally had, to impeach the transaction."

a bill to set it aside ; but not if there were an independent intention to bar the entail, and the fraud applied only to some part of the transaction distinct from that object.(*h*)

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he might have barred.

When relief is given, the conveyance will stand as a security for the principal sum and simple (but not compound)(*i*) interest ;(*k*) and for moneys expended by him in lasting and valuable improvements, and interest ;(*l*) he will, of course, be charged with what he has actually received, and interest ; and, in one case, where he had received from the vendor interest on the purchase-money such payments were held to have been in reduction of the principal, and he himself was charged with interest upon them ;(*m*) and it seems doubtful whether he will not, like a mortgagee, be charged with what, without wilful default, he might have received :(*n*) where inadequacy of price is the sole ground for the interference of the court, he may \*be allowed his costs :(*o*) but slight additional circumstances will induce the court to refuse them.(*p*)

Terms on which vend. or is entitled to relief.

[\*359]

And, of course, long delay and clear(*q*) acquiescence on the part of the vendor,—(and this notwithstanding his poverty,)—or his advised confirmation of the purchase will bar the right to relief :(*r*) and we may here remark, that the statement of consideration in the conveyance is not conclusive, but any additional consideration, not inconsistent with the terms of the deed, may be established by parol evidence.(*s*)[1]

Right to, lost by acquiescence or confirmation.

(*h*) See *Bellamy v. Sabine*, 2 Ph. 425.

(*i*) *Gowland v. De Faria*, 17 Ves. 20.

(*k*) S. C.

(*l*) *Murray v. Palmer*, 2 Sch. & Lef. 490.

(*m*) S. C., *ib.* 488.

(*n*) See Sug. 327, and the judgment in *Murray v. Palmer*, 2 Sch. & Lef. 489, against such liability ; but see *contra* the decree, *ib.* 490.

(*o*) *Bawtree v. Watson*, 3 Myl. & K. see p. 341, and earlier cases cited ; see Sug. 326.

(*p*) *Wood v. Abrey*, 3 Madd. see p. 424.

(*q*) See *Gerrard v. O'Reilly*, 3 Dru. & W. 414.

(*r*) *Vide supra*, pp. 25, 26 ; and see *Knight v. Marjoribanks*, 11 Beav. 322 ; *Farmer v. Farmer*, 1 H. L. C. 724 ; *Sibbering v. Earl of Balcarres*, 14 Jur. 753, V. C. K. B.

(*s*) *Clifford v. Turrell*, 1 Y. & C. C. C. 138 ; affirmed 9 Jur. 633.

[1] The difficulty seems to be in determining what constitutes a different

(3) *Vendor's rights of pre-emption under Lands Clauses Consolidation Act, 1845.*Rights of  
pre-emption,  
etc., of.

By the Lands Clauses Consolidation Act, 1845, the promoters of the undertaking authorized by the special act,

consideration, or a consideration which cannot *stand with the deed*. Sometimes even where the effect, or operation of the deed, as such, was not in question, a different consideration has been said to mean one of a different *species*; for instance, a *valuable* consideration, where the deed expresses merely a *good* one, &c.; and that proof of an *additional* consideration of the same kind, was allowable. So on the other hand, it has been contended, that a different consideration was one differing from that expressed, in any particular, even in amount. It seems to be settled that where a deed expresses a consideration, and then adds, "and for divers other considerations" you may always aver and prove what these considerations really were. See *Mead v. Sleger*, 5 Porter's Rep. 506; *Jones v. Sasser*, 1 Dev. & Batt. 466; *Miller v. Bagwell*, 3 McCord's Rep. 568; *Benedict v. Lynch*, 1 John. Ch. Rep. 270; *Jack v. Dougherty*, 3 Watts' Rep. 155, 156, 157, *et seq.*; *Maigley v. Haner*, 7 Johns. Rep. 342; 6 Monroe Rep. 291. So where no consideration is expressed, or the deeds imports to have been made upon divers good considerations, you may prove the true one, and give it effect accordingly. So where a blank is left for the consideration. *Stevens v. Griffith*, 3 Verm. Rep. 448; *Hartly v. M'Anulty*, 4 Yeates Rep. 25; *Davenport v. Mason*, 15 Mass. Rep. 85; *White v. Weeks*, 1 Pennsylv. Rep. 486; *Wood v. Beach*, 7 Verm. Rep. 522.

A deed importing a *voluntary conveyance* from a father to his son, was assailed by a creditor of the father on the ground of its having been given to screen the property from being made liable for the father's debts. The party claiming under the deed, in order to repel the fraud, offered to show, among other things, that the father was indebted to the son, in an amount equal to the value of the property conveyed. The court held the evidence admissible, on the ground that it might conduce to rebut the idea of *fraud in fact or the intention to defraud*. The father it said, might have sold the land to his son, or a stranger for a valuable consideration, and given a good title for the same, although his debts might have been double in amount, to the value of his property, unless his creditors had acquired a lien upon it. It would have been no fraud, in judgment of law, against his creditors, for him to have paid *one* and left the others unpaid. Had the evidence been offered for the purpose of showing that the deed was given for a *valuable consideration*, and in satisfaction of a debt due from the father to the son, and not for the consideration of *love and affection*, as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a *valuable* for a *good* consideration, and a violation of the well settled rule of law, that parol evidence is inadmissible to annul or substantially vary, a written agreement. Such was not the object of the evidence. The adverse party having gone into proof of circumstances out of the deed, which are insisted upon as evidence of a fraudulent intention, the evidence of the father's indebtedness to his son,

are required, within the periods thereby prescribed, or if, no period be prescribed, within ten years after the expiration of the time thereby limited for the completion of the works, to sell such lands as shall not be required for the purposes of the undertaking; and such superfluous lands, unless they be situated in a town,<sup>(t)</sup> or be lands built upon or used for building purposes, are to be first offered to the person then entitled to the lands, if any, from which the same were originally severed; or, if he "refuse, or for six weeks neglect to signify his wish, to purchase the same or cannot be found, then to other adjoining owners; and unless a sale be made either to such person, or adjoining owners, or some other person, the superfluous lands remaining unsold at the expiration of such period are to vest in and become the property of the owners of the land adjoining thereto, in proportion to the

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vendors  
under Lands  
Clauses  
Consolidation  
Act,  
1846, in  
respect of  
superfluous  
lands.

[\*360]

(t) The word "Town" has been held to mean, the space on which the dwelling-houses are collected so near each other that they may be said to be continuous; so also an open space occupied as a mere accessory to the convenience of a dwelling-house, would seem to come within the term; *Elliot v. South Devon Railway Company*, 5 Rail. Ca. 500.

was to meet the presumption thus raised. The evidence to show the fraud, and that which was offered to repel it related to *collateral*, and independent facts, unconnected with the deed, and could not therefore, in any manner, vary or alter its terms. *Hinde's lessee v. Longworth*, 11 Wheat. Rep. 199. A deed assailed on the ground of fraud, against creditors expressed a money consideration which had never passed; and the party claiming under it, sought to support it by proof that the true consideration was marriage. Held that this could not be done, though both considerations were *valuable*. *Betts v. The Union Bank of Maryland*, 1 Harr. & Gill, 175. In Virginia, where a deed purporting, on its face, to have been made in consideration of "natural love and affection," and also of "one dollar," was assailed on the ground of fraud as against creditors; held, that parol proof of other *valuable* considerations, besides the nominal one expressed, was admissible to sustain it. *Harvey v. Alexander*, 1 Rand. Rep. 219. So in Ohio. *Steele v. Worthington*, 2 Ham. Rep. 182, 185. In Massachusetts any consideration of the same general species, may it seems, be proved, to sustain the deed. *Bullard v. Briggs*, 7 Pick. Rep. 533. The same doctrine prevails in Pennsylvania. *Jack v. Dougherty*, 3 Watts' Rep. 151. See *Johns v. Church*, 12 Pick. 557, 561; *Epper v. Randolph*, 2 Call's Rep 103; *Duval v. Bibb*, 4 Hen. & Munf. 113; *Hildreth v. Sands*, 2 John. Ch. Rep. 35; *Brackett v. Wait*, 6 Verm. Rep. 426, 427; *Brooks v. Maltbie* 4 Stew. & Porter, 96, *et seq.*

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extent of their lands respectively adjoining the same : (u) the right of pre-emption above noticed would seem not to affect a contract entered into with a third party for the sale of superfluous land, if the offer to the parties entitled to pre-emption be made and rejected before conveyance. (v)

(4.) *Vendor's remedies at Law and in Equity on purchaser's covenants.*

We have already seen that covenants are occasionally entered into as well by the purchaser with the vendor, as by the vendor with the purchaser; and that such covenants will, in equity, bind a purchaser who accepts the benefit of a conveyance, although he do not execute it. (w)

Purchaser's  
covenants,  
how  
classified.

Covenants entered into by purchasers are of three descriptions; first, such as relate to interests possessed or acquired by the covenantee in the purchased land, independently of the covenant; e. g., a covenant to pay a rent-charge issuing out of the land, or to maintain a road over it; secondly, such as are not connected with any such interests in the purchased land, but which restrict or limit its mode of enjoyment by the purchaser and his representatives; e. g., a covenant that the land shall not be built upon, or shall be built on only in a particular manner; and thirdly, covenants relating to the production and custody of the title deeds. (x)

[\*361]

Whether  
first class  
run with the  
land.

As respects the first class of covenants, it appears to be not perfectly clear (y) whether the vendor or his representatives could enforce them as against an alienee of the land, even although the alienee have the estate of the original covenantor; and where this is not the case,—as where in a conveyance to A. in fee, to such uses as B. shall appoint, and in default of appointment to the use of B. in fee, B. covenants with the vendor for payment of rent, and then conveys to C. in exercise of the power of

(u) See sects. 127, 128 and 129.

(v) *London and Greenwich Railway Company v. Goodchild*, 8 Jur. 455, V. C. E.

(w) *Vide supra*, pp. 265, 266.

(x) See Third report of Real Property Commissioners.

(y) *Ibid.* p. 53; but see Sug. 730, where it is held that the action will lie.



appointment, no action will lie against the alienee upon Chap. X.V.  
the covenant.(z)[1]

(z) *Roach v. Wadham*, 6 East, 289; and see Sug. 731, and further on the subject of privity of estate, *infra*, p. 364.

[1] The rent charge is an incorporeal hereditament, and issues out of the land, and the land is bound by it; the covenant, therefore, may well run with the rent in the hands of an assignee; the nature of the subject which savors of the realty, altogether distinguishes the case from a matter merely personal.

The real property commissioners (third report, p. 53) observe, that whether the burthen of such covenants runs with the land, so that an action of covenant at law can be maintained against an alienee, seems to have been lately questioned. It has, they add, sometimes been considered, to depend on priority of estate, that is, on the party sought to be charged, having or not having the estate of the covenantor. They then refer to the case cited in the text, and observe that the court must, in that case, have considered this distinction as influencing their decision, for they suffered it to be argued at great length, which would have been unnecessary, if the action would not lie, even supposing the defendant to have had the estate of the covenantor. They conclude that it is certain that the rule of law, as to this point, is not very clearly laid down by the old text books, and it may have been the intention of the judges to confine the rule to covenants entered into by lessees. There is, they add, no doubt, ground for distinction between covenants by lessees, and covenants by the owners of the fee. "These observations," says Sugden, (Sug. on Ven. vol. 2, 327,) "hardly do justice to the opinion of the court in *Roach v. Wadham*, where both the bar and the bench treated it as clear, that the action would lie, if the defendant was assignee. Mr. Abbott, for the defendant, contended, that the deeds operated as an execution of the power, and not as a conveyance of the interest, and that the covenant for the payment of the rent, did not pass (that is run) with the estate; he then argued the question upon the power, and added, that though, if it were considered as a conveyance by the releasee, with the consent of the first purchaser, still the defendant would not be chargeable in the action, *because he was not sued as the assignee of the first purchaser*. Not a word escaped him as to the non-liability of the defendant to the action, if he did take the estate of the first purchaser, and yet, that would at once, have settled the question. Lord Ellenborough, who delivered the opinion of the court, that the second purchaser took under the power, adverted to covenants entered into by the second purchaser, with the first purchaser, to pay the rent and indemnify the latter from it, and observed, that the covenants in the deed of conveyance to the second purchaser, did not appear to the court at all to militate with their construction; for had it been the intention of the parties that the second purchaser should take as assignee of the first, such covenant on the part of the latter, would have been less necessary than if he were intended to take as appointee; for in the former case, the first purchaser would have had some security that

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Second class  
do not, *sem-*  
*ble*; but may  
be enforced  
in equity  
against ali-  
enee with  
notice.

As respects covenants of the second class, it appears to be extremely doubtful (a) whether they could, at law, be enforced against an alienee, although the assigns be expressly named in the covenant; (b) it has even been doubted (c) whether an alienee with notice can be affected in equity by a covenant which would not bind him at law; but the contrary doctrine seems to be warranted by the earlier authorities, and has been acted upon in several recent cases. (d) [1]

(a) See third report of Real Prop. Com.; 2 Myl. & K. 545; and *Ex parte Ralph*, 1 De G. 219.

(b) *Sed aliter* in the case of a demise; *Spencer's case*, 5 Rep. 16; it has been recently decided that a covenant by a lessor to build a house on the demised land, or to indemnify the lessee against specified liabilities, will not, at law, bind the assignees of the reversion, if not expressly named: *Doughty v. Bowman*, (in error,) Exch. Ch., affirming the judgment of the Q. B., 1 V. Q. B. 444, nor, *semble*, even if named; see judgment.

(c) *Keppell v. Bailey*, 2 Myl. & K. 517.

(d) *Whatman v. Gibson*, 9 Sim. 196; *Mann v. Stephens*, 15 Sim. 377, affirmed on appeal, 379; *Tulk v. Moxhay*, 11 Beav. 571; 2 Ph. 774; and see *Hemingway v. Fernandes*, 13 Sim. 228; *Bristow v. Wood*, 1 Coll. 480; see also *Schreiber v. Creed*, 10 Sim. 9; and see Sug. 742.

he would not be called upon to pay this rent arising from the circumstances of the second purchaser being liable to be sued by the original vendor. But he added, that whether the conveyance were intended to operate in the one way or the other, these covenants were fit and proper for the security of the first purchaser; for if the second purchaser were the assignee, and liable to be sued in covenant, the original vendor, if the second purchaser did not pay the rent, might sue the first purchaser on his covenant to pay it; and in that case, the second purchaser's covenant was proper for the first purchaser's indemnity; and if the second purchaser were not liable to be sued by the original vendor, and it was nevertheless the intention of the parties that the second purchaser should pay the rent, a covenant from him to the first purchaser to pay such rent and to indemnify the first purchaser therefrom, became the more necessary. The observation of the commissioners that this question has sometimes been considered to depend on privity of estate, may perhaps mislead the student, for the *only* question is, whether, where the assignee is in privity of the estate, he is bound by the covenant; if there is no such privity, it is not denied by any, that he is not chargeable in such action."

[1] The real property commissioners (third report, p. 54) state two doubts which have arisen upon such covenants. First, whether they would run with the land so as to bind all successive owners of it? Judged by the usual rule, (and supposing the rule to be applicable,) they add, perhaps.

\*The equitable remedy is, of course, an injunction to restrain a breach of the covenant; and this will only be

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But not in all cases.

this doubt may be thought to be unfounded, for they relate directly and immediately to the land. They state that they are not aware of any instance in which an action at law upon such a covenant, has been brought against an assignee of the land. In a few cases, they add, the subject has been brought before courts of equity, by suit against an assignee of the land; in some of these cases, the court has refused to interfere, by way of injunction, but the validity of the covenant, or its binding the assignee, has never been negatived by decision. "This," says Sugden, (Sug. on Ven. vol. 2, p. 328,) "is stating the case too negatively; for in such cases as I have known to arise, the right to equitable relief has never been doubted, but the question has been only, whether the plaintiff has, by his own conduct, presented his claim to relief: the right to equitable relief, at least, is clear; for assuming the contract to be a valid one, it binds the land in the view of a court of equity; and a specific performance of it will be enforced, or what amounts to the same thing, the owner of the land will be enjoined from committing a breach of the covenant." The other doubt adverted to by the commissioners, is, whether covenants of this description are not open to the objection of creating a perpetuity? The argument is, that the doctrine of perpetuity is not confined to a restriction or alienation, but that it applies to every provision or engagement, the effect of which may be to impede the free circulation of property in land; and they contend that in order to secure that freedom of alienation, land ought not to be capable of being subjected to any burthen or interest, which the owner of the fee cannot discharge it from, within the period of perpetuity, except rents, rights of way, light and water, and other easements now acknowledged by the law. They observe that they are not aware that this subject has ever been discussed in any court. "But there have been cases," says Sugden, "in which the objection might have been raised, although it was not, which is an argument against it. The law of perpetuity has never been so propounded as to go beyond the power of alienation. There is no objection, in point of law, to the owner of an area surrounded by houses, contracting that it shall never be built upon; it does not affect the power of alienation, nor the right of enjoyment; the former wholly prevails, and so does the latter, in the several parties, *according to the contract*. Rights of way, for example, show that the law allows one man's land to be perpetually burdened with an easement in favor of another, so that he can never build upon the spot or do any act which will interfere with the right of way. It is begging the question to say that this, and the like cases, are exceptions. They are authorized by the law, and the privileges under discussion, are of a like nature; so little indeed, is the supposed doctrine recognized by the law, that the law itself, independently of contract, prevents a man from altering his house, for example, where it would obscure the light which his neighbor has for a given period enjoyed."

A covenant in a deed of land not to erect a building on a common

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granted against an alienee who bought with notice of the covenant; nor will it be granted where no real damage is likely to be sustained, or the circumstances which were contemplated when it was entered into no longer exist; for instance, the court has refused to enforce specific performance of a covenant against the erection of buildings, where the plaintiff had himself erected buildings whose effect was to destroy those very advantages which it was the object of the covenant to maintain.(e)

Third class—  
remedies  
upon.

As to covenants of the third description, viz., relating to title deeds, the right to enforce them at law against an alienee seems probably (as with covenants of the first kind) to depend upon his having the estate of the original covenantor;(f) but an alienee who bought with notice of the covenant would be bound in equity to produce the deeds;(g) and it seems probable that the benefit of such a covenant by a purchaser would at law run with the land retained by the vendor.(h)[1]

(e) *Duke of Bedford v. Trustees of British Museum*, 2 Myl. 552.

(f) As to which, *vide infra*, p. 364, and see Sug. 481 and 483, and the remarks on *Barclay v. Raine*, 1 Sim. & Stu. 449; and see 9 Jarm. Conv. 98, 356.

(g) See Sug. 474; and as to the general equitable right to production, independently of any covenant, *vide supra*, p. 202, *et seq.*

(h) See Mr. Jarman's note, 9 Jarm. Conv. by S. 356 *et seq.*; and third report of Real Prop. Com. 52; but see Sug. 713.

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or public square owned by the grantor in front of the premises conveyed, is a covenant running with the land, and passes to a subsequent grantee of the premises, without a special assignment of the covenant. *Trustees of Watertown v. Cowen*, 4 Paige, 510.

[1] The real property commissioners observe (third report, 56,) that in the case of *Barclay v. Paine*, 1 Sim. & Stu. 449, where vendor had not the custody of the original deeds, but had a covenant for the production of them, it was decided that the title was not marketable, because the covenant did not run with the land. They add that it had previously been supposed, either that an original independent equity existed, entitling any party interested in a deed to call for its production, by any other person having the custody of it; or at least, that such an equity existed wherever the parties requiring the production claimed under a person who had taken the precaution to procure a covenant for that purpose; and the person having the actual custody of it, derived that custody from or through a person who had entered into such a cove-

And the covenantor and his representatives may be sued upon covenants of any of the above kinds, although they may not bind the alienees of the land.(i)

And upon a covenant simply collateral to the land—*e. g.*, to pay a sum of money—the assignee is not liable although expressly named.(k)

Under the recent bankruptcy act,(l) when the assignees of any bankrupt, who is entitled to land, under a conveyance to him in fee, or under an agreement for such a conveyance, subject to any perpetual yearly rent thereby reserved, shall elect to take the land or the benefit of the conveyance or agreement, the bankrupt is not to be liable to pay any rent accruing after the issuing of the fiat or filing of the petition, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants and agreements in the conveyance or agreement; and if the assignees shall decline to take the land or the benefit of the conveyance or agreement he is not to be liable if, within fourteen days after notice of their having so declined, he shall deliver up the conveyance or agreement to the person then entitled to the rent or having so agreed to convey; and if the assignees do not elect on request, any person entitled to the rent or having so conveyed or agreed to convey, or any person claiming under him, may apply to the court; and the court may order them to elect, and deliver up such conveyance or agreement, in case they shall decline the same, and the possession of the premises; or may make such other order therein as it shall think fit.

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Covenantor and his representatives liable on covenants in gross.

Assignee not liable on covenant simply collateral.

[\*363]

Liability of covenantee, how affected by bankruptcy.

(i) See and consider *Stokes v. Russell*, 3 Durn. & E. 678.

(k) *Spencer's case*, 5 Rep. 16.

(l) 12 & 13 Vict. c. 106, see s. 145.

nant. In practice it was not considered that a court of equity would regard the subtle distinctions which prevail in courts of law, between covenants which do and those which do not run with the land, and they point out the evil consequence of this decision. "The rule in equity," says Sugden, (2 Sug. on Ven. 83.) "never was so universal, as it is quoted in the first part of the foregoing statement; but the second branch, stating what *at least*, the doctrine was, appears to be correct.

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(5.) *Purchaser's remedies on vendor's covenants.*

Purchaser's  
general  
remedy for  
defects after  
conveyance  
depends on  
vendor's  
covenants.  
[\*364]

With some few special exceptions, (m) a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of any defects either in the title to, or quantity, or quality of, the estate, which are not covered by the vendor's covenants.

His remedies under covenants for title, are only against vendor and his representatives.

And to consider first the legal rights of the purchaser and his representatives under the covenants for title.

Such covenants, it may be observed, bind only the covenantor and his representatives[1] and not alienees as such; it is therefore only necessary to consider who are entitled to the benefit of them.

Benefit of covenants for title runs with seisin,

Such covenants may be enforced at law, not only by the covenantee and his representatives, but by alienees who claim under the seisin vested in the original covenantee, or, as it is expressed, in privity of estate; (n) for instance, if A. convey land to B. and his heirs to certain specified uses, or to such uses as C. shall appoint, and covenant for title with B. and his heirs, the right to sue upon the covenants will go with the seisin to the persons from time to time claiming under the uses limited by the conveyance, or under any appointment by C. under his power; (o) so, if the conveyance were to B. and his heirs, to such uses as C. shall appoint, and in default of appointment to the use of C. in fee, and A. covenant with C. and his heirs, and C. (instead of exercising his power of appointment) convey the estate limited to him in default of appointment, his alienee, it appears, can sue upon A.'s covenants; (p) so, if C., in exercise of his power, appoint

to extent que  
sue and his  
representatives.

No covenants with

(m) *Infra.*

(n) 3 Durn. & E. 402.

(o) See Sug. 709.

(p) See Sug. 710, where the point is held to be free from doubt; but see Third Report of Real Prop. Com. 52.

[1] To make a covenant run with the land, there must be a subsisting privity of estate, between the covenanting parties. The general covenant that the grantor will warrant and defend the title is not a covenant real in the sense of the old feudal law. *Hurd v. Curtis*, 19 Pick. Rep. 459; *Gore v. Brazier*, 3 Mass. Rep. 544, 545; *Marston v. Hobbs*, 2 lb. 438; *Trenchard v. Morris*, 6 Cowen's Rep. 123; *Bender v. Fromberger*, 4 Dall. Rep. 442; *Clute v. Robinson*, 2 Johns. Rep. 595; *Judson v. Wuss*, 11 lb. 525; *Carpenter v. Bailey*, 17 Wen. Rep. 244.

the land to the use of D., and covenant with him and his heirs for title, C.'s covenants can be sued upon by the alienees of D.: and in the two former cases, the right to sue upon A.'s covenant's, and, in the last case the right to sue upon C.'s covenants, will go with the land to all successive owners: (q) and the \*heir or assignee although not named in the covenants for title may nevertheless sue thereupon. (r)

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*cestui que use* will run with his estate.

[\*365]

But, in the case last supposed, D.'s alienee, although he might sue upon C.'s covenant, could not sue upon A.'s; as he would not take the estate of A.'s covenantee; (s) so, if C., instead of appointing to the use of D., were to appoint to such uses as D. should appoint, D.'s appointee could not sue upon C.'s covenant; for he would not take the estate of C.'s covenantee.

But cannot be sued on by alienee not claiming in privity of estate.

Sir E. Sugden intimates a sort of doubt (t) whether the doctrine of privity of estate may not apply as well to covenantor as to covenantee; that is, whether, in order that the alienee may sue, he must not only claim the estate of the covenantee, but also claim it under a conveyance or appointment by the covenantor; which, in a large proportion of conveyancing transactions, is not the case: the real property commissioners consider that the doubt is set at rest by authority; (u) and this conclusion, although not acquiesced in by Sir E. Sugden, is usually (it is believed) acted on in practice. [1]

Whether there must be privity of estate, as well with covenantor as covenantee.

(q) See Sug. 709 *et seq.*

(r) See 2 Bac. Abr. 349.

(s) *Roach v. Wadham*, 6 East, 289.

(t) Sug. 713.

(u) See Third Report, p. 52, and 9 Jarm. Conv. by S. 356; Smith's Leading Cases, 3rd. ed. 30.

[1] "The proposition" says Sugden 2 Sug. on Vend. p. 311 "that it is not sufficient that a covenant is concerning the land, but in order to make it run with the land there must be a privity of estate, between the covenanting parties, leads to the consideration of the question, whether it applies as well to covenants entered into by a vendor, as to covenants entered into by a purchaser. If it do, the consequences of this doctrine are truly alarming. In a great proportion of cases, the vendor has either mortgaged the estate in fee, or is a mere *cestui que trust*; and if his covenants were to be deemed covenants in gross, the assignees of the

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Covenants run with leasehold or copyhold estate.

Privity at actual date of covenant whether essential.

Benefit of covenants apportioned with land and estate.

[\*366]

Will run with incorporeal hereditaments.

And the benefits of the covenants will go with the estate of the original covenantee, although leasehold, (w) or copyhold; (x) nor is it clearly essential that the estate should be actually vested in the covenantee at the date of the covenant; it would probably be sufficient if the covenants were entered into preparatory to the estate being so vested, and as part of the same transaction. (y)

Where land is divided, the benefit of attendant covenants \*will, it seems, go to each alienee in respect of the portion of land taken by him; (z) so, where the estate is divided, as where it becomes vested in A. for life, remainder to B. in fee, and the breach of covenant affects the entire inheritance, the owner of each portion of the inheritance can sue for damages proportioned to the extent of his estate. (a)

It has been decided, that covenants will run with tithes the same as with land; (b) and the better opinion seems to be, that, in this respect, there is no distinction between tithes and other incorporeal hereditaments. (c) [1]

(w) *Noke v. Awdler*, Cro. Eliz. 436, and *Lewis v. Campbell*, 8 Taunt. 715.

(x) See *Riddell v. Riddell*, 7 Sim. 529.

(y) *Ibid.* 534, 535, and Sug. 711: the doctrine however seems open to remark, and perhaps can be scarcely relied on in practice; see 3 Dav. Conv. 306.

(z) See Sug. 743; and 9 Jarm. Conv. by S. 366; and *Thynne v. Pickard*, 2 B. & Ald. 105.

(a) See 9 Jarm. Conv. by S. 404; *Noble v. Cass*, 2 Sim. 343.

(b) *Bally v. Wells*, 3 Wils. 25.

(c) See 9 Jarm. Conv. by S. 360; and Sug. 724.

land could only compel performance of the covenants, by the circuitous mode of using the name of the first purchaser or his representatives, whom, at the distance of some years, it might be very difficult to trace. It seems impossible to get over the objection by the form of the covenant; for although the vendor covenant with the purchaser, his heirs and assigns, yet the assignee will not be entitled to the benefit of the covenant, unless it run with the land under the general rule of law."

[1] A covenant by the lessee of tithes not to allow any of the farmers to have any of the tithes, had been held to run with the tithes in the hands of an assignee so as to bind him. The court said they should consider whether there was any difference, between lands and tithes, as to this matter; it was objected that tithes were incorporeal, and could not endure, or support a covenant by the lessee for him and his assigns to run with



Where the estate is merely equitable, there can be no assignee at law, and the covenants cannot be enforced at law by an equitable assignee; so, if the conveyance, although intended so to do, do not in fact pass any legal estate, it appears that the assignee cannot sue; (d) but in either case, the assignee, although unable to sue in his own name, would be entitled to sue in the name of the original covenantee. (e)

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Remedy on covenants in conveyance of equitable estate.

Assignee may sue in name of covenantee.

In considering what amounts to a breach of the several usual covenants for title, it may be premised, that, as respects the covenants for seisin in fee, (or, in the case of a lease, that the lease is valid,) and for right to convey, surrender, or assign; and also the usual trustee's covenants against incumbrances; the same, if broken at all, are necessarily broken immediately upon the execution of the assurance which contains them; (f) so that the statute of limitations immediately begins to run in favor of the \*covenantor: whereas the usual covenants that the purchaser shall enjoy the estate, free from incumbrances, and for further assurance, can only be broken by subsequent events; and the statute does not begin to run until there is an actual breach, and then only in respect of that particular breach. (g) [1]

As to breach of covenants for title.

Statute of Limitations runs, from what time.

[\*367]

(d) 9 Jarm. Conv. by S. 366.

(e) See *Riddell v. Riddell*, 7 Sim. 529.

(f) See *Salman v. Bradshaw*, Cro. Jac. 304: as to whether recitals of the vendor's title in the conveyance can estop the purchaser, *vide supra*, p. 233.

(g) See 9 Jarm. Conv. by S. 402.

them, so as to bind the assignee; but if, (it was added) we could strip the mind of the idea of the matter, there seemed to be no difference between an inheritance in lands, and an inheritance in tithes. And although in the case cited, the question was as to an assignee of tithes being bound by a covenant entered into by the grantee thereof, yet the principle is the same as though the question were, whether the assignee could take advantage of a covenant entered into with the grantee. See 2 Sug. on Vend. 322.

[1] A general covenant that the seller is seized or possessed of the estate, for the interest granted, is broken immediately after the execution of the deed, if the seller has not the fee or estate granted, and the purchaser need not wait until he is evicted; but this is not peculiar to a general covenant, for a limited covenant would likewise be at once broken if the

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Covenants  
for seisin and  
right to con-  
vey, how  
broken.

Purchaser  
may sue be-  
fore eviction.

A covenant that the vendor is seised in fee of an estate conveyed as freehold, is, of course, broken, if the estate be copyhold ;(h) and, a covenant that the vendor and another conveying party have good right to convey, is broken if such other party, although having the estate, be under any personal incapacity to transfer it.(i)

The purchaser may, if he please, bring an action immediately on discovering the defect in title, without waiting to be evicted or disturbed.(k)[2]

(h) *Gray v. Briscoe*, Noy, 142: the word "not" in the report is evidently a clerical error; see context.

(i) *Nash v. Aston*, Sir T. Jones, 195.

(k) Sug. 764.

title were bad within the limits of the covenant. And the purchaser may negative the alleged seisin or possession of the seller, without stating affirmatively what estate he has. And the same observations apply to a covenant for right to convey. But a covenant for quiet enjoyment affords no right of action, until a disturbance: the erection of a gate which obstructs the covenantee's necessary right of way, whether set up by right or by wrong, would be a breach of the latter covenant, for in either case an obstruction ought not to be erected there. As to the covenant that the estate is free from incumbrances, which is connected with the covenant for quiet enjoyment, there is an obvious distinction between a covenant that the estate is free from incumbrances, which is not the form of the common covenant, and which would be broken as soon as made, if there were any incumbrance; and a covenant like that commonly entered into by the vendors, that the purchaser shall enjoy, free from incumbrances, which so long as he does the covenant, would not be broken. It is immaterial that no estate passes by the conveyance; for if a man will grant to another that which he has not, and covenants that he had a good right to grant this, whereas he had no right at all, this clearly, is a breach of covenant. And the covenantee, may, without prejudice to his remedy, wait till he is evicted, although the breach is the want of title or right to convey, and the eviction is only a consequential damage. See 2 Sug. on Vend. 357, 358.

In *Sibley v. Spring*, 3 Fairfield Rep. 460, where one covenanted to sell and convey a lot of land for an agreed price, to be paid at a time subsequent to the giving of the deed, it was held that a tender of a deed of warranty, while the land was under the incumbrance of a mortgage, was not a fulfilment of the covenant.

[2] Where the covenant is for further assurance, if the seller will not convey, the purchaser may recover the whole value of the estate. It is better, however, in general, to wait until the ultimate damage is sustained; for, otherwise he could not recover the whole value. But where the title is defective, a purchaser, as suggested in the text, would not be bound

The common covenant for quiet enjoyment is broken by a suit in equity, although equitable disturbances be not specified ;(*l*) or by the obstruction of a necessary right of way, (*m*) or a verbal notice to tenants to pay rent to the adverse claimant ;(*n*) the covenant, if general, is not broken by a *wrongful* claim or eviction, (*o*) unless it be the act of the covenantor himself, or his heirs or executors (if named,) (*p*) in which case the wrongful act, if intended as a claim to title, (*q*) is a breach even of a covenant against lawful disturbances ;(*r*) [3] and a covenant in terms

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Covenant for quiet enjoyment and free from incumbrances.

- (*l*) *Hunt v. Danvers*, T. Raym. 370 ; and see 2 Ventr. 214 ; Sug. 746.
- (*m*) *Andrews v. Paradise*, 8 Mod. 318.
- (*n*) T. Raym. 371.
- (*o*) See *Kirby v. Hansaker*, Cro. Jac. 315 ; *Dudley v. Folliott*, 3 Durn. & E. 584.
- (*p*) See 9 Jarm. Conv. by S. 376.
- (*q*) See *Penn v. Glover*, Cro. Eliz. 421 ; *Morgan v. Hunt*, 2 Vent. 213 ; *Lloyd v. Tvmkies*, 1 D. & E. 671.
- (*r*) *Lloyd v. Tvmkies*, *ubi supra*.

to wait, but might bring his action of covenant, and, if necessary, offer to re-convey the interest or title actually vested in him. See Sugd., vol. 2, p. 358.

[3] The following reasons are given why the covenants should not extend to tortious evictions :—1. It is unreasonable, as the vendor cannot prevent the entry ; 2. The vendee has his remedy against the wrong-doer, and therefore ought not to charge an innocent person ; 3. The vendee would have a double remedy for the same injury ; 4. It might open a door to fraud, for the purchaser might secretly procure a stranger to make a tortious entry, that he might charge the covenantor with an action. See *Kent v. Welch*, 7 Johns. Rep. 258 ; *Foillard v. Wallace*, 2 Johns. Rep. 395 ; *Greenby v. Wilcocks*, 2 Johns. Rep. 4 ; *Vanderkarr v. Vanderkarr*, 11 Johns. Rep. 122 ; *Sedgwick v. Hollenback*, 7 Johns. Rep. 376 ; *Manley v. Henley*, 4 Mass. Rep. 442 ; *Marston v. Hobbs*, 2 Mass. Rep. 433 ; *Bearce v. Jackson*, 4 Mass. Rep. 408 ; *Hamilton v. Cutts*, 4 Mass. Rep. 349 ; *Duwall v. Craig*, 2 Wheat. Rep. 45, 61 ; *Pringle v. Wittens' ex'rs.*, 1 Bay, 254 ; *Yancy v. Lewis*, 4 Hen. & Munf. 390 ; *Mitchell v. Warner*, 5 Conn. Rep. 497 ; *Ker v. Shaw*, 13 Johns. Rep. 236.

Where the covenantor himself does any act asserting a title, it will be a breach of the covenant, although he covenanted against *lawful* disturbances only, and the act done by him was tortious, and might be the subject of an action of trespass. See *Sedgwick v. Hollenback*, 7 Johns. Rep. 376. And, if the covenant extend to his heirs or executors, the rule equally applies to them ; though the contrary was formerly held. It must, however, be an act asserting a title ; therefore, if the seller went on the estate to sport, the purchaser could not maintain covenant ; nor would an

Chap. XIV. extending \*to pretended claims,(s) or a general covenant against disturbances by specified individuals,(t) or by claimants in general (with a specified exception),(u) is broken by a wrongful disturbance: it was held in one case,(w) that covenants for seisin in fee and good right to convey free from incumbrances, were not broken when parties were, at the date of the conveyance, in actual possession of part of the estate under leases made by a stranger under a mistake; but the decision seems to be of very doubtful authority.(x)[1]

(s) *Chaplain v. Southgate*, 10 Mod. 384.

(t) *Foster d. Wilson v. Mapes*, Cro. Eliz. 212.

(u) *Woodroff v. Greenwood*, Cro. Eliz. 518.

(w) *Jerritt v. Weare*, 3 Pri. 575.

(x) See Sug. 747.

entry for the purpose of personally assaulting the purchaser, be a breach of covenant. So, a covenant against all claiming, or *pretending to claim* any right, extends to a tortious eviction. And where a general covenant is made a limited one by an exception, the exception will be strictly construed.

[1] In the case here cited, the seller covenanted generally that he was seised in fee, without any condition, &c., or any other estate, matter, cause, restraint, or thing whatsoever whereby to alter, bar, charge, burthen, impeach, incumber, or determine the same. It appeared that the lady of the manor had actually demised a small part of the land sold, for ninety-nine years, determinable on lives, and the lessees had entered and continued to enjoy the estates. It was held the leases were made by mistake, and did not amount to a disseisin, and that the covenant did not extend to the leases. It seems that the leases were accompanied with actual possession by the lessees, who had expended money on the property; so that they were within the covenants. General covenants for title are always intended to guard against a title adverse to the covenantor's, although it may not be a lawful title. The leases were clearly a charge on the property *at the time of the conveyance*, and an ejectment, at all events, was necessary to dispossess the lessees. They, therefore, were an incumbrance within the covenant. It is different from the case of interruptions subsequently to the conveyance, by persons not claiming lawfully.

It may be stated, generally, that every right to, or interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee of it, by the conveyance, must be deemed in law an incumbrance. Hence, a right to an easement of any kind, in the land, is an incumbrance. So is a mortgage. And a paramount right which may wholly defeat the plaintiff's title, is an incumbrance. It is a weight on his land which must lessen the value of it. So also, a claim of dower which may partially defeat the plaintiff's title, is an incumbrance.

The word "acts" means something done by the person against whose acts the covenant is made; and the word "means" has a similar meaning, viz., something proceeding from the person covenanting(y) or the person against whose acts, &c., the covenant is made;[2] where A. procured a fine to be levied to himself and his wife and his own heirs, an entry by the widow was held to be a breach of his covenant with a lessee for quiet enjoyment against himself(A.) and all persons claiming by his "means;"(z) so, a covenant for quiet enjoyment against all persons claiming "under" the covenantor, is broken by an entry by his widow;(a)[3] or by a person claiming under the exercise by the covenantor of a power of appointment, although the estate was never vested in the covenantor;(b)[4] but a covenant for quiet enjoyment against persons claiming

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Meaning of particular expressions — "acts," "means,"

"claiming under;"

(y) *Per Cur. in Spencer v. Marriott*, 1 B. & C. 459.

(z) *Buller v. Swinerton*, Cro. Jac. 657.

(a) *Anon. Gobd.* 333.

(b) *Hurd v. Fletcher*, Doug. 43.

[2] In *Spencer v. Marriott*, which the author cites, it seems a man holding under a lease which contained a power of re-entry, in case a particular act should be done, made an under-lease, in which he covenanted for quiet enjoyment, without any interruption by him, or by or through his acts or means, and this lessee, in alleged ignorance of the terms of the original lease, under-let the estate, and the under-lessee committed the act which gave to the original lessor a right of re-entry, which he accordingly exercised, the eviction was held not to be within the covenant, for it was not produced by anything proceeding from the covenantor, but from the person in possession of the premises.

[3] But otherwise, if the mother of the covenantor claim her dower, because she does not claim by, from, or under him.

[4] In this case, A. and his wife levied a fine of *her* estate, to the use of A., for life, with power of leasing; remainders over, with a joint power of revocation to A. and wife. They exercised this power, and subject to the husband's life estate, and power of leasing and other uses, which afterwards determined, limited the estate to T. in tail. A. afterwards granted a lease not warranted by the power, and covenanted for quiet enjoyment by the lessee, without any interruption by him, or any person or persons claiming, or to claim by, from, or under him. T.'s remainder in tail having fallen into possession, he evicted the lessee on account of the defective execution of the power, whereupon the lessee brought an action against A.'s executors; and it was held that A. was a necessary party to the second declaration of uses; and therefore, T. claimed under him, and the eviction was within the covenant.

Chap. XIV. "by, from, or under" him, seems not to extend to persons claiming by title paramount in respect of his mere default;(c) although it may be otherwise where the paramount title is brought into operation by his "acts:"(d) a covenant for quiet enjoyment against persons claiming "by or through his default," would, it appears, be broken by an entry by parties whose title he had it in his own power to bar;—e. g., if he were tenant in tail in possession, and the entry were made by remaindermen;(e)—and such a covenant has been held to extend to claims in respect of arrears of quit rent, although they accrued due before he acquired the estate;(f)[1] the decision, how-

(c) *Stanley v. Hayes*, 2 G. & Dev. 411; a case of distress for land tax, which the covenantor ought to have paid; but see *Ireland v. Bircham*, 2 Sc. 207.

(d) See a note to 9 Jarm. Conv. by S. 380, where the learned editor, coming to a different conclusion, contends that for this purpose acts and defaults are identical, as to which, query; and see Sug. 751, where the decision in *Stanley v. Hayes*, is approved of.

(e) *Lady Cavan v. Pulleney*, 2 Ves. jr., 544.

(f) See *Howes v. Brushfield*, 3 East, 491.

[1] For the court said, if it were in arrear in his life-time, it was a consequence of law, that it was by *his default*; that is, *by his default* in respect of the party with whom he covenants to lease the estate unincumbered. In this case, it was agreed by the counsel for the vendor, and apparently on very solid grounds, that to make the vendor liable to the arrear of this rent, under his covenant, would be tantamount to a decision that the covenant, although limited, should extend to the acts of all the world. The clear intention of the parties was that the vendor should covenant against his own acts only; and yet, it should seem that the argument of the court would apply as well to a mortgage, or any other incumbrance, created by a prior owner, as to an arrear of quit-rent, in payment of which a former occupier made default. See 2 Sug. on Vend. pp. 344, 345.

It has been held that where the lessor covenants against all claiming under him, it is no breach of such covenant that the tax collector enters and seizes goods for arrears due prior to the lease. *Stanley v. Hayes*, 3 Ad. & El. 105. Where a landlord covenanted to repair all external parts of the premises leased, and the corporation, by virtue of an act subsequently passed, took down an adjoining tenement, leaving the partition and wall without support, which thereby gave way; held, an action would lie upon the covenant, notwithstanding a provision in the statute, for compensation. He was bound immediately to make the necessary repairs. *Green v. Eales*, 2 Ad. & Ell. 225. In Pennsylvania, seizure and eviction by public enemies is a defence to the obligation of giving up the premises in repair. *Pollard v. Shouffer*, 1 Dall. Rep. 210.

ever, is disapproved of by Sir *E. Sugden* ;(*g*) but the omission by the covenantor to acquire from other parties a valid title, although he knew the defect, is not a "neglect or default" within the meaning of such a covenant. (*h*)[2]

A covenant that the covenantor has not knowingly or willingly "permitted or suffered" any act, &c., does not extend to an act by others, which he was a party to, but had no power to prevent; *e. g.*, a mortgage in which he (as trustee to bar dower) has concurred :(*i*) but, of course, in such a case, the covenant would have been broken

(*g*) *Sug. 750.*

(*h*) See *Woodhouse v. Jenkins*, 9 Bing. 431.

(*i*) *Hobson v. Middleton*, 5 B. & C. 295.

[2] In this case, a tenant for life and his eldest son, remainderman in tail, demised to A. for 99 years, he being aware of their title, and they covenanted with him for quiet enjoyment against themselves, their heirs and assigns, and all persons claiming under them. A. granted an under lease of the estate to B., and covenanted for quiet enjoyment against himself, his heirs, administrators, executors and assigns, "or of, or by any other person or persons, whomsoever, lawfully claiming, or to claim by, from, or under him, them or any of them, or by his, their, or any of their acts, means, consent, neglect, default, privity or procurement." The tenants for life and intail both died, the latter without issue, and B. was evicted by the next remainderman. It was held that A. was not liable on his covenant, for the eviction was by a title paramount, which he could not have defeated. The court observed that if the eviction could be brought within the terms of the covenant, it must fall within that part of it which provides against any persons claiming "by the acts, means, consent, neglect, default, privity, or procurement of A., etc." It was not an eviction arising from the acts, means, or procurement of the lessor. The court said that in the present case, no act was done by the lessor, no consent was given to the eviction, there was no privity, no procurement; and consequently, the only words of the covenant, if any, upon which a breach could be assigned, would be the remaining words, "neglect or default." The circumstances might indeed show a want of discretion in A., that he took leases under such a defeasible title; but a neglect and a default seemed to imply something more than the mere want of discretion with respect to his own interests; something like the breach of a duty or legal obligation existing at the time; those words, in their proper sense, implying the not doing some act to secure his title which he ought to have done, and which he had the power to do, and the not preventing or avoiding some danger to the title, which he might have prevented or avoided.

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"party or  
privy to."As to cove-  
nants against  
known de-  
fects.

[\*370]

had it proceeded in the usual form, "or been party or privy to." (k) [3]

It seems doubtful whether covenants for title would be held to extend to a defect known to the purchaser at the time of their being entered into: (l) and it has been suggested (m) \*that such a defect should be particularly specified, and that, unless it be apparent on the face of the conveyance, the covenant should be entered into by a separate instrument; if, however, the defect be not so apparent, it is conceived that a memorandum, signed by the covenantor, and admitting that the defect was known and intended to be provided for by the covenants, would be sufficient: for, as the covenantor, seeking to escape the general terms of the covenant, must then by evidence de-hors the deed, show that the covenantee had notice of the

(k) See 6 B. & C. 303.

(l) See Butler's note to Co. Litt. 384. a.

(m) *Ibid.*; Sug. 702; and 9 Jarm. by S. 381.

[3] The latter words are not supplied by the former; for the words, "permitting and suffering" do not bear the same meaning as "knowing of, and being privy to:" the meaning of the former is, that the covenantor has not concurred in any act over which he had control; they apply only to that which he could prevent; and such a covenant extends to such permissive acts only as have, through the permission, an operative effect in charging the estate. Therefore, where, as in the case cited in the text, a mere trustee, to bar dower, (the purchaser taking the fee, subject to his interposed estate,) joined with the purchaser in making a mortgage, having previously concurred with him in another conveyance, it was of course held that the latter conveyance was a breach of his covenant, that he had done no act to incumber the estate, and the court would not look to the nature of his estate, or the trust engrafted on it; but, it was held that he was not responsible for the concurrence of the purchaser in the same deed, although he had covenanted that he had not *permitted or suffered* any act whereby any incumbrance was created. The common words, that he had not been party or privy to, would have given a remedy under a covenant; for, of course, he was party, and therefore privy to the conveyance, although the purchaser might have conveyed without him. It was pleaded that the trustee consented to the execution of the incumbrance, by the purchaser; and, it was suggested that perhaps the incumbrancer might have refused the conveyance, unless it were made with the consent of the defendant. But the court said they could not raise that point, inasmuch as the plea did not allege that the consent of the covenantor was an ingredient in the transaction necessary to the acceptance of the conveyance. See 2 Sug. on Vend. pp. 345, 346.



d defect, so the covenantee might similarly show that the defect, though known, was not intended to be excepted :(*n*) but the defect, if apparent on the conveyance, should be specified in the covenants.

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The ordinary covenant to do all "reasonable" acts for further assurance, or all such acts, &c., as the purchaser shall reasonably require, is not broken by a refusal to do an unnecessary act ;(*o*)[1] or by a refusal occasioned by the act of God ; *e. g.*, the insanity, (*p*) death, or severe illness of the party whose further assurance is required ;(*q*) or by a refusal to give a bond for quiet enjoyment ;(*r*) or, according to the general opinion, a covenant for production of title deeds ;(*s*) or, perhaps, to enter into fresh covenants for title. (*t*)[2]

Covenant for further assurance—what acts not comprised in.

But such covenant will be broken by a refusal to convey \*any interest acquired in the estate, even by purchase for valuable consideration ;(*u*) or to execute a duplicate of the conveyance, if the original has been burnt, (*v*) or (*semble*) handed over to a sub-purchaser of part of the

What are comprised in.

[\*371]

(*n*) See 1 Sim. & Stu. 445.

(*o*) *Warn v. Bickford*, 9 Pri. 43.

(*p*) *Pet and Cally's case*, 1 Leon. 304.

(*q*) See *Nash v. Aston*, Sir T. Jones, R. 195 ; and *Anon. Moore*, 124, where sickness was held a valid reason for a married woman not levying a fine, and the court agreed that the case would be the same, "*si la feme soit grossement enseint sic ut ne poit traveller.*"

(*r*) *Staynroyde v. Locock*, Cro. Jac. 115.

(*s*) See *Hallett v. Middleton*, 1 Russ. 243 ; Sug. 461.

(*t*) *Coles v. Kinder*, Cro. Jac. 571, but the point is not clear ; see Sug. 769 ; and 9 Jarm. Conv. by S. 401, n.

(*u*) *Taylor v. Debar*, 1 Ch. Ca. 274.

(*v*) Sug. 460.

[1] A covenant to do all reasonable acts, means such acts as the law requires ; and, if it be an unnecessary act which is called for, it is not a reasonable act, or one which would be required by law.

[2] And it was held in the last case cited above, that an agreement by a seller to convey the estate by such reasonable assurance as by the purchaser should be advised and required, did not authorize the purchaser to require a conveyance by common covenants against incumbrances by the seller, and for further assurance, because the agreement was not to make the assurance with reasonable covenants.

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Time allowed to party required to execute further assurance.

Covenants for title, how restricted.

Only by clearly expressed intention.

Covenants for title, how classified.

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estate :(*x*) but, in such cases the conveyance should bear an indorsement expressing that it is a duplicate.(*x*)

The party called upon to execute the further assurance may claim a reasonable time in which to procure professional assistance :(*y*) and, according to modern practice, which the courts would doubtless recognize, a draft of the proposed assurance is furnished to him, that he may submit it to his legal advisers.(*z*)

A vendor's covenants for title are, as we have seen, generally limited to the acts of himself, his ancestors and testators, (if he have taken the estate otherwise than by purchase,) and persons claiming by, through, under or in trust for him or them respectively; it, however, frequently happens either that some of the covenants are general and others limited, or that the limited covenants are not consistent in their restrictions; in such cases questions arise as to how far the restrictions in one covenant affect another.

A covenant, general in terms will be so construed, unless a contrary intention clearly appear;(*a*)[1] this, however, may be evidenced by any part of the instrument.(*b*)

Before considering the effect of restrictive words in the covenants themselves, we may remark, that the five usual covenants may be divided into three classes, having distinct objects; viz, first, the covenants for seisin and right to convey, which are strictly covenants for title; secondly, \*the covenants for quiet enjoyment, and *that* free from incumbrances, (not a covenant that the estate *is* free from incumbrances, but merely that there shall be no disturbance by incumbrancers;) and thirdly, the covenant for further assurance: and that the first class may be broken without there being any breach of the second or third; for the purchaser, although not acquiring a marketable

(*x*) *Napper v. Lord Allington*, 1 Eq. Ca. Ab. 166.

(*x*) *Ibid.*

(*y*) *Dennet's case*, Cro. Eliz. 9.

(*z*) See Sug. 769.

(*a*) See Sug. 755.

(*b*) See 2 Bos. & P. 22, 25.

[1] See *Whallon v. Kauffman*, 19 Johns. Rep. 97; *Jackson v. Stevens*, 14 Johns. Rep. 410.

title, may be undisturbed in the possession, and may never require any further assurance, or may obtain what he does require: also that, if either of the second class be broken (unless it be so worded as to extend to wrongful disturbances,) there must have been a breach of the first class: and lastly, that the covenant for further assurance may be broken without there being any breach of either of the other classes.

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Upon this subject the four following propositions are laid down by Sir *E. Sugden*; viz., first, that "where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct;"(c) secondly, that "where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent;"(d) thirdly, that "as on the one hand a subsequent limited covenant does not restrain a preceding general covenant, so, on the other hand, a preceding general covenant will not enlarge a subsequent limited covenant;"(e) and fourthly, that "where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others."(f)

Restrictive words, effect of: Sir E. Sugden's proposition respecting;

Of the above propositions, the first, if read in connection \*with the above classification of the covenants and of their separate objects, seems to be warranted by the authorities: (g) the second proposition, (which together, or rather as connected, with the first, is disputed by the learned Editor of Mr. *Jarman's* work on conveyancing.) (h) is, perhaps, hardly accurate; for, although a prior general covenant, will not, it appears, be restrained by a subse-

how far maintainable.

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(c) Sug. 756.

(d) *Ib.* 759.

(e) *Ib.* 761.

(f) Sug. 762; and see *Young v. Raincock*, 7 C. B. 310; *Crossfield v. Morrison*, 13 Jur. 565.

(g) See *Nervin v. Munns*, 3 Lev. 46; *Browning v. Wright*, 2 Bos. & P. 13; *Foord v. Wilson*, 2 J. B. Moore, 592; as controlled by *Howell v. Richards*, 11 East, 633; *Stannard v. Forbes*, 6 Ad. & E. 572.

(h) Vol. ix. p. 383.

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quent limited covenant having a different object,<sup>(i)</sup> yet where two covenants relate to the same object, restrictive words in the second may, it seems, control the generality of the first:<sup>(k)</sup> the third and fourth propositions seem to be unimpeachable.

Grammatical construction generally determines the effect of covenants.

And, of course, restrictive words occurring in one covenant may extend to another, if the grammatical connection of the two require, and no inconsistency would result from, such a construction:<sup>(l)</sup> "and the court will endeavor to ascertain the intention of the parties from an attentive consideration of the whole deed, or construe the covenants either as independent or as restrictive of each other, according to such apparent intention."<sup>(m)</sup>[1]

(i) *Barton v. Fitzgerald*, 15 East, 530; *Gainsford v. Griffith*, 1 Saund. 58 i.; *Smith v. Compton*, 3 B. & Ad. 189.

(k) See *Nind v. Marshall*, 3 J. B. Moore, 703, 717; but not necessarily, see *Hesse v. Stevenson*, 3 Bos. & P. 565; *Saward v. Anstey*, 10 J. B. Moo. 55; see also *Martyn v. M'Namara*, 4 Dru. & W. 411, where Sir E. Sugden, C., appears to have considered that a general covenant with A. might be cut down by restrictive words in a covenant entered into upon the same subject-matter with B. upon the same instrument.

(l) *Broughton v. Conway*, Dy. 240; *Peles v. Jervies*, Dy. 240, n.; and see 6 Ad. & E. 587; *Rich v. Rich*, Cro. Eliz. 43.

(m) 1 Saund. R. n. p. 60.

[1] The following is the substance of the cases cited in the text:—In *Nerim v. Munns*, the vendor covenanted; 1st, that notwithstanding any act by him to the contrary, he was seized in fee; 2dly, that he had good right to convey; 3rdly, that the lands were clear of all incumbrances, made by him, his father, or grandfather; and 4thly, that the vendee should quietly enjoy the estate against all persons claiming under the vendor, his father, or grandfather. And it was held by three justices against North, chief justice, that the second covenant, although general, was restrained by the first covenant, to acts done by the vendor. So, in *Browning v. Wright*, where a vendor who claimed an estate in fee, by purchase, sold the estate, and covenanted first, that notwithstanding any thing by him done to the contrary, he was seized in fee "and that he had good right, &c.," to convey in manner aforesaid, it was held that the generality of the latter covenant, was restrained by the restrictive words, in the former. For in the first place, the purchaser was, according to the general practice, entitled to limited covenants only; and in the next place, the special covenants would be of no use, if the other were general. Besides, the defendant having covenanted that "for and notwithstanding anything by him done to the contrary" he was seized in fee, and that he had good right to convey; the latter part of the covenant coupled as it was, with the former part, by the words "and that," must necessarily be overridden

Upon the death of a covenantee, or other person entitled to the benefit of covenants for title which run with the

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Whether  
real or per-  
sonal repre-

by the introductory words "for and notwithstanding anything by him done to the contrary." In *Peles v. Jervies* tenant *per aucter vie* leased for twenty-one years, and covenanted that he had not done any act *but* the lessee should, or might enjoy it, during the years; afterwards, within the twenty-one years, *cestui que vie* died; and it was adjudged that the covenant was not broken, for "*but*" referred the subsequent words to the preceding words. So in *Stannard v. Forbes*, where the seller of a leasehold estate depending upon a life, covenanted that, notwithstanding any act by him done, the lease was valid, *and that the same*, and the term therein expressed, was in full force, and in nowise determined, &c., otherwise than by effluxion of time, the second covenant was held to be restrained by the first, and was therefore not broken, although the life upon which the lease depended, had dropped before the assignment. And it was considered to be no objection to this construction, that these last words rendered the restriction nonsensical, as effluxion of time, could have been no act of the covenantor. And the facts that the seller knew the life had dropped before the assignment, and had paid rent to the lessor after this knowledge, so as to create a tenancy from year to year, were deemed immaterial: for the construction of the covenant could not depend upon the covenantor's knowledge, and the lease had expired before the tenancy from year to year was created, so that the act of the seller did not affect it. In *Howell v. Richards*, where the covenants were introduced with the usual words, restricting them to the covenantor's own acts, but the covenants for quiet enjoyment ended thus: "of or by the said grantors, or any of them, &c., or of or by any other person or persons whatsoever;" and the covenant against incumbrances, was general, excepting only a chief rent; the Court of King's Bench determined that the covenant for quiet enjoyment was not restrained by the introductory words of restriction, but was general and unlimited. Lord *Ellenborough*, C. J., in delivering the opinion of the court, laid great stress on the covenant being a distinct covenant from the covenant for title. He said that it was perfectly consistent with reason and good sense that a cautious grantor, should stipulate in a more restrained and limited manner, for the particular description of title which he purports to convey, than for quiet enjoyment. He may suspect, or even know, that his title is, in strictness of law, in some degree, imperfect, but he may, at the same time, know, that it has not become so, by any act of his own; and he may likewise know, that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever, to those who should take under it; he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible, while he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found, at any period, to have been liable to some exception, at the time of his conveyance. He did not find any case in which it was held that the covenant for quiet enjoyment, was all one, with the covenant for title, or parcel of that covenant, or in necessary construction, to be governed by it, otherwise, than as according to the general rules for the construc-

land, and have been broken in his lifetime, the right of action, so far as any actual damage has been 'sustained

tion of deeds is to be construed—according to the intention of the parties. In *Broughton v. Conway*, a covenant that the vendor had not done any act to disturb the vendee, *but that the assignee might enjoy*, without disturbance of him, *or any other person*, was held to be confined to acts done by the vendor, on the ground of the latter words being only a continuation of, and dependent on, the preceding matter. In this case however, one of the judges was decidedly of a contrary opinion; and certainly there were express words to get over, namely, "or any other person;" "which circumstance" says Sugden (2 Sug. on Vend. 351.) does not occur in any other of this line of cases, in all of which, the reader will perceive, that no word was rendered inoperative, but the introductory clause was merely held to extend over all the distinct covenants, in the same manner as a general introduction to a will, frequently influences the whole will. In *Mind v. Marshall*, where the subject was elaborately discussed, the covenants in an assignment of a leasehold estate were: 1. That notwithstanding any act by the seller, the lease was a good lease; 2d. That the purchaser might peaceably enjoy, without any interruption from the seller, his executors, administrators, or assigns, or any other person or persons whatsoever, having or lawfully claiming, or who should, or might at any time or times thereafter, during the said term, have or lawfully claim any estate, &c., in the premises; *and that free from incumbrances by the seller*; and moreover, for further assurance by the seller, his executors and administrators, and all persons claiming by, from, under, or in trust, for him or them. All the covenants therefore, were restricted to the acts of the seller, except the covenant for quiet enjoyment, which, in words, expressly extended to all mankind. It was held by three judges against one, that by construction, the covenant for quiet enjoyment was restrained to persons claiming under the seller, and this case was distinguished from *Howell v. Richards*, on the ground that there, the covenant respecting incumbrances contained words as general as the words of the preceding covenant for quiet enjoyment, with one exception, viz., the chief rent which was not an act or default of the party, or of any claiming under him: this exception therefore, confirmed the generality of all the other words. In *Smith v. Compton*, the deed was a common conveyance under a power, the creation of which, was recited in the usual way. The covenants by the seller, were, 1. That the power was in full force; 2. That he had a good right to appoint and convey; 3. For quiet enjoyment against the seller, or any person or persons, claiming, or to claim by, from, or under, or in trust, for him; 4. Free from incumbrances made by the seller, or any other person or persons claiming or to claim, by, from, through, under, or in trust for him; 5. For further assurance by the seller, and all persons claiming or to claim by, from, or under, or in trust for him. It was determined that the second covenant for right to convey, was absolute, and not qualified by the subsequent covenants. The case of *Barton v. Fitzgerald*, arose upon covenants in an assignment of a lease. The lease was recited to be for the term of ten years, and the seller assigned the estate to the purchaser, for the residue

by him, belongs to his executors or administrators ;(n) but, except to the extent of such actual damage, the right to sue descends with the land, if freehold or copyhold, to the heir or devisee ;(o) or, if leasehold, to the executors or administrators ; or, (if specifically bequeathed,) to the legatee, (after their assent to the bequest.)[1]

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may sue for breach.

(n) *Lucy v. Levington*, 2 Lev. 26.

(o) *Kingdon v. Nottle*, 1 Mau. & S. 355; *King v. Jones*, 5 Taunt. 418.

of that term. The covenants were, first, the common covenant, that the seller had done no act to incumber, except an under lease; 2dly, that the lease was subsisting, and not become void or voidable; 3dly, for quiet enjoyment against the act of the seller; and lastly, for further assurance of the seller during the residue of the term. It appeared that the lease was for ten years, if a person should so long live, and he died after the assignment, but before the expiration of the ten years, by effluxion of time. The Court of King's Bench held, that the second covenant was general and unlimited, and that by the death of the *cestuis que vie*, the purchaser had a good right of action. The judges relied principally on the recital. The exception of the under lease, which was for a term absolute, imported, they thought, that the seller had a right to incumber, absolutely, for the term stated, and they were of opinion that all the other covenants would be operative, though the second were construed to be absolute. In *Gainsford v. Griffith*, on an assignment of a leasehold estate, the vendor covenanted that the lease was a good, certain, perfect, and indefeasible lease in the law, and so should remain during the residue of the term, and that the purchaser, his executors, administrators and assigns, should quietly enjoy the premises without any let, denial, &c., by the vendor, his executors or assigns; and acquitted, or otherwise saved harmless, of all incumbrances committed by the vendor. And it was held that the generality of the preceding covenant, was not restrained by the latter covenant. In the case of *Hesse v. Stevenson*, where on an assignment of certain shares of a potent right, the assignor covenanted that he had good right, &c., to convey the shares, and that he had not, by any means, directly or indirectly forfeited any right or authority he ever had, or might have had, over the same, it was decided that the generality of the first covenant, was not restrained by the latter covenant. The court said that the covenant, instead of being framed in the usual and almost daily words, where parties intend to be bound by their own acts only, viz., "for and notwithstanding any act by him done to the contrary," omitted them altogether. The omission of these words was almost of itself decisive. The attention of the purchaser was not called by any words to the intent of the vendor to confine his covenant to his own acts. The court ought not to indulge parties in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood.

[1] In *Hamilton v. Wilson*, 4 Johns. Rep. 72, where an action for a breach of the covenant of seisin in a deed was brought by the heir of the grantee against the grantor, for a breach in the life time of the ancestor,

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Customary  
heir may sue  
before ad-  
mittance,  
*semble*.

Damages,  
what amount  
of recover-  
able where  
no eviction.

And the customary heir of a copyholder might, it is conceived, sue upon the covenants before admittance; "being a complete tenant against all persons but the Lord."(*p*)

Where the title is defective, and an action is brought upon the covenants before eviction, there seems to be no general rule by which the amount of damages should be determined; where the purchaser has acquired an indefeasible estate, but of a less extent than that which he contracted for, the amount, (if he choose to retain the estate,) would seem to be, the difference between the estimated values of the two estates; as if, for instance, the land prove to be copyhold instead of freehold: (*q*) Sir *E. Sugden* seems to consider(*r*) that where the title is defective within the covenant, the purchaser, before eviction, may offer to re-convey the estate and claim the entire purchase-money; but no authority is cited for this proposition: at any rate, if an action were brought before eviction,—unaccompanied by an offer to re-convey,—it seems that the entire value could not be recovered; unless, perhaps, the alleged breach consisted in a refusal by the defendant to perfect the title. (*s*)

What

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Where there has been actual eviction, the purchaser \*may recover interest, under the name of damages, for the

(*p*). *Scriv. on Cop.* 290.

(*q*) *Gray v. Briscoe*, Noy, 142; see *Wace v. Bickerton*, 19 L. J. 254, Ch.

(*r*) *Sug.* 765.

(*s*) See 5 Taunt. 428.

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it was held that the action could not be sustained; upon the ground that, as there was a failure of title, the covenant was broken immediately on the execution of the deed, and that the grantee had an immediate and perfect right of action in his life time, which went to his personal representatives, and could not descend to the heir. So, also, it has been held that the assignee of a grantee cannot maintain an action against the grantor for a breach of the covenant of seisin, because, if the grantor has no title, the covenant is broken immediately, and the breach is a mere *chose in action* which is incapable of assignment. *Greenby v. Wilcocks*, 2 Johns. Rep. 1; *Mitchell v. Warner*, 5 Conn. Rep. 497; *Bickford v. Page*, 2 Mass. Rep. 555; *Warston v. Hobbs*, 2 Mass. Rep. 433; *Bennet v. Irwin*, 3 John. Rep. 365; *Pollard v. Dwight*, 4 Cranch, 430; *Mitchell v. Hazen*, 4 Conn. Rep. 495; *Davis v. Lyman*, 6 Conn. Rep. 249.



time during which he has been out of possession: (t)[1] upon the same principle, he would be entitled to interest

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amount of recoverable where there is eviction.

(t) *King v. Jones*, 5 Taunt. 418; see 422.

[1] The buyer, on the covenant of seisin, recovers back the consideration-money and interest, and no more. The interest is to offset the claim for mesne profits, to which the grantee is liable, and is commensurate in point of time with the legal claim to mesne profits. The grantor has no concern with the subsequent rise or fall of the land by accidental circumstances, or with the beneficial improvements made by the purchaser, who cannot recover any damages either for the improvements or the increased value. This, says Kent, appears to be the general rule in this country. See 4 Kent's Com. 475; *Smith v. Story*, 14 Pick. Rep. 128; *Sterling v. Peet*, 14 Conn. Rep. 245; *Staats v. Van Eyck*, 3 Caines' Rep. 111; *Pitcher v. Livingston*, 4 Johns. Rep. 1; *Bennett v. Jenkins*, 13 Johns. Rep. 50; *Marston v. Hobbs*, 2 Mass. Rep. 433; *Caswell v. Wendell*, 4 Mass. Rep. 108; *Bender v. Fromberger*, 4 Dal. Rep. 441; *Wilson v. Forbes*, 2 Dev. N. C. Rep. 30; *Seamore v. Harlan*, 3 Dana's Ken. Rep. 415; *Tapley v. Labaume*, 1 Missouri Rep. 552; *Martin v. Long*, 3 ib. 391; *Buckmaster v. Grundy*, 1 Scammon's Rep. 312, 313; *Earle v. Middleton*, 1 Cheves' Law and Equity S. C. Rep. 127. The measure of damages, on the covenant of warranty, in Massachusetts, Maine, Vermont and Connecticut, is the value of the land at the time of eviction, without regard to the consideration in the deed. See 4 Kent, 475, and cases cited. "This rule," says Kent, "was adopted in the first settlement of the country, when the value of the land consisted chiefly in the improvements made by the occupants; and if the warranty would not have secured to them the value of those improvements, it would not have been of much benefit to them. In other states, the measure of damages, on a total failure of title, even on the covenant of warranty, is the value of the land at the execution of the deed, and the evidence of that value, is the consideration-money and costs. If the subsisting encumbrances absorb the value of the land, and quiet enjoyment be disturbed by eviction by paramount title, the measure of damages is the same as under the covenants of seisin and warranty. The uniform rule is to allow the consideration-money, with interest and costs and no more. If the encumbrance has not been extinguished by the purchaser, and there has been no eviction under it, he will recover only nominal damages, inasmuch as it is uncertain whether he would ever be disturbed. If, however, the grantor had notice to remove the encumbrance and refused, equity would, undoubtedly, compel him to raise it and decree a general performance of a covenant of indemnity, though it sounds only in damages. The ultimate extent of the vendor's responsibility, under all or any of the usual covenants in his deed, is the purchase-money with interest; and this I presume to be the prevalent rule throughout the United States. If the eviction be only of a part of the land purchased, the damages to be recovered under the covenant of seisin, are a rateable part of the original price; and they are to bear the same ratio to the whole consideration that the value of the land to which the title has failed bears to the value of the whole tract. The contract is not rescinded so as

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Moneys paid  
by way of  
compromise,  
and costs,  
when re-  
coverable.

Not sums  
expended in  
improve-  
ments.

upon any charge on the estate which he had been compelled to satisfy; it seems, however, to be doubtful whether he could recover it for such period as he had, without reasonable excuse, neglected to sue upon the covenant.(v) So if he, without communicating with the vendor, compromise an adverse claim or suit, he may recover the amount paid by him, and his costs of suit as between attorney and client, subject only to the right of the vendor to show, either that the claim was wholly or in part unfounded, or that better terms might have been procured :(w) and it would appear that, if the vendor, upon notice given to him of a suit within the terms of his covenant for quiet enjoyment, refuse to defend it, he could not, as against the purchaser, dispute the validity of the claim :(x) it does not, however, appear that the latter could safely defend an action without giving notice to the vendor or the party liable upon his covenants,(y) and obtaining his directions, if the defence is apparently hopeless.(z) It seems doubtful whether, in any case, the purchaser could recover the expenses of improvements, although stated as special damages in his declaration;(a) but there may, perhaps, be a difference between improvements consisting

(v) See *Anderton and another v. Arrowsmith*, 2 P. & D. 408.

(w) *Smith v. Compton*, 3 B. & Ad. 189 and 407.

(x) See *Duffield v. Scott*, 3 D. & E. 377.

(y) See 3 B. & Ad. 408; *Lewis v. Peake*, 7 Taunt. 153.

(z) See *Gillett v. Rippon*, 1 Mood. & M. 406; *Short v. Kalloway*, 11 Ad. & E. 28.

(a) *Lewis v. Campbell*, 3 J. B. Moore, 35.

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to entitle the vendee to recover back the whole consideration-money, but only to the amount of the relative value of the part lost." 4 Kent's Com. 475, 476, 477.

A vendor sells land to which he has no title, either in law or equity; if he acquires a title afterward, he should convey to the vendee. If such vendor after he acquires title, conveys the land to another, he is answerable to the first vendee for the value of the land at the date of the conveyance. *Grahams v. Hackwith*, 1 A. K. Marsh. 423. If a vendor is able to make title to a part only of the land sold, the election devolves on the vendee to take the title for so much as can be made, and go for damages as to the remainder, or go for damages as to the whole. *Forman v. Rodgers*, 1 A. K. Marsh. 427.

in additions to the property,—*e. g.*, expensive building erected upon the land, and mere improvements of the land itself.(b)[2]

(b) See 3 J. B. Moore, 52, 54, 57.

[2] With regard to the right of a *bona fide* purchaser under a defective title, without notice to be paid for his improvements upon the estate against the true owner, Chancellor Walworth, in *Putnam v. Ritchie*, 6 Paige's Rep. 390, said, "I have not been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant who has made improvements upon land, the legal title to which was in the defendant, where there has neither been fraud nor acquiescence on the part of the latter, after he had knowledge of his legal rights. I do not, therefore, feel myself authorized to introduce a new principle into the law of this court, without the sanction of the legislature, which principle, in its application to future cases, might be productive of more injury than benefit. If it is desirable that such a principle should be introduced into the law of this state, for the purpose of giving the *bona fide* possessor a lien upon the legal title for the beneficial improvements he has made, it would probably be much better to give him a remedy by action at law, where both parties could have the benefit of a trial by jury, than to embarrass the title to real estate with the expense and delay of a protracted chancery suit, in all such cases." In *Bright v. Boyd*, 1 Story's Rep. 478, this question was much discussed. Mr. Justice Story, in delivering the opinion of the court, said: "The other question, as to the right of the purchaser *bona fide* and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value, under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I shall be inclined to pause. Upon the general principles of courts of equity, acting *ex aequo et bono*, I own that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value. I am aware that the doctrine has not as yet been carried to such an extent in our courts of equity. In cases where the true owner of an estate, after a recovery thereof at law from a *bona fide* possessor for a valuable consideration without notice, seeks an account in equity as plaintiff, against such possessor, for the rents and profits, it is the constant habit of courts of equity to allow such possessor (as defendant) to deduct therefrom the full amount of all the meliorations and improvements which he has beneficially made upon the estate; and, thus to recoup them from the rents and profits. So, if the true owner of an estate holds only an equitable title thereto, and seeks the aid of a court of equity to enforce that title, the court will administer that aid only upon the terms of making compensation to such *bona fide* possessor, to the amount of his meliorations and improvements of the estate, beneficial to the true owner. In each of these cases, the court acts upon an old and established maxim in its jurisprudence, that he who seeks equity must do equity. But it has been supposed that courts of equity do not, and ought not to go further,

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Bankruptcy  
and certifi-  
cate were no  
defence to  
action.

A certificate in bankruptcy has been held to be no defence to an action for breach of covenants for title happening before the bankruptcy, the demand not being a liquidated debt.(c)

(c) *Hammond v. Trolms*, 7 Durn. & E. 612; but see now and consider, 12 and 13 Vict. c. 106. s. 188.

and to grant active relief in favor of such a *bona fide* possessor making permanent meliorations and improvements by sustaining a bill brought by him therefor, against the true owner, after he has recovered the premises at law. I find that Mr. Chancellor Walworth, in *Putnam v. Riltzie*, entertained this opinion, admitting, at the same time, that he could find no case, in England or America, where the point had been expressed or decided either way. Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such *bona fide* purchaser, in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a *bona fide* purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete. Is it reasonable or just that, in such a case, the true owner should recover and possess the whole, without any compensation whatever to the *bona fide* purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man, the property and money of another who is in no default. The argument, I am aware, is that the moment the house is built, it belongs to the owner of the land by mere operation of law; and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law, by which the true owner seeks to hold what, in a just sense, he never had the slightest title to, that is, the house. It is not answering the objection; but merely and drily stating that the law so holds. But then, admitting this to be so does it not furnish a strong ground why equity should interpose and grant relief? I have ventured to suggest that the claim of the *bona fide* purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity; and, in this view of the matter, I am supported by the positive dictates of the Roman law."

A fraudulent possessor is never allowed for beneficial improvements. *Van Horne v. Fonda*, 5 Johns. Ch. Rep. 388, 416. A purchaser of land under a sheriff's sale will, if the title fail, be allowed for improvements, and answerable for the rents. *Sarcey v. Reardon*, 1 A. K. Marsh. 2. A possessor of land without title, legal or equitable, but *bona fide* believing it to be his own, is by the general principle of equity entitled to compensation for his improvements. *Aliter*, if he knows himself to be without title. *Barlow v. Bell*, 1 A. K. Marsh. 246. An imperfect contract for land, dependent for its completion on contingencies which never happened, does not entitle the occupant to compensation for improvements,

If the covenantor died before the 16th July, 1830, no action for a breach of covenants for title would lie against

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Formerly no action of covenant, against devl-  
see.

he must be considered a tenant at will, the improvements made for his own accommodation, and must surrender on the demand of the owner. *Howe v. Logwood*, 3 A. K. Marsh. 389. Where land has been recovered in ejectment, and the defendant goes into chancery to obtain compensation for improvements, he will not succeed if he had notice of the plaintiff's title, at the time of making the improvements. *M'Kim v. Moody*, 1 Randolph, 58. A purchaser who is evicted, is not entitled to compensation for improvements unless the owner has been guilty of a fraud by permitting such improvements, without giving notice to the possessor, or of gross laches in asserting his claim after he is apprised of it. *Morris v. Terrell*, 2 Randolph, 6. Courts of equity will decree compensation for improvements made under the faith of a parol purchase which the vendor refuses to execute. *Grimes v. Shrieve*, 6 Monroe, 557. Although the owner of land may lie by and let a person make improvements on it, and subsequently recover it, yet as a general rule a person having only an equitable title will not be allowed to do so. *Craigs v. Sidwell*, Litt. Sel. Ca. 285. If a vendee be let into possession, and the contract is subsequently rescinded on the ground of misrepresentations by the vendor, and want of title, the vendee will be liable only for the actual rents and profits. And he will also be allowed for improvements. *Richardson v. M'Kinson*, Litt. Sel. Ca. 320. Where the vendor parts with the title so as to preclude him from completing the sale, it is a fraud on the vendee, for which the vendor must answer in damages for the increased value of the land up to the time when damages are assessed. *Fisher's heirs v. Kay*, 2 Bibb, 435. If vendee acquires possession under a verbal and void contract of sale, he will be allowed for improvements made *bona fide*, before the vendor asserts his right to the land. And the vendee is liable to rents from the time of such assertion. *Fox v. Lonly*, 1 A. K. Marsh. 389. If the vendee receives pay for improvements on eviction, and afterward the vendor establishes his title to be paramount, the vendee may be compelled to refund to the evictor what he has received for improvements. *Morton's heirs v. Ridgeway*, 3 J. J. Marsh. 257. If the vendor on eviction of the vendee, has refunded the consideration and interest, the vendee is responsible for rents, but must be paid for permanent improvements. *Ib.* A purchaser evicted on account of defective title, (or released from his purchase by the vendor on that account,) is entitled to reimbursement for useful improvements. *Witherspoon v. Anderson's ex'rs.*, 3 Desau. 245. *Aliter*, where the defect was notorious and the land bought on speculation, far below its value. It seems, in such case, he shall not be reimbursed even his purchase-money. *Ib.*, 246, 247. If a vendor sell lands, with improvements made by himself, with warranty, and the vendee is evicted by a stranger with a better title, the vendee may recover of the successful claimant for the improvements; and if he neglect to do so, and bring his suit for the purchase-money, the vendor is entitled to a deduction for the value of such improvements. *Pulliam v. Robinson*, 1 Monroe, 223. See *Waterman's Amer. Ch. Dig. tit. Vendor and Vendee*.

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his devisee ;(*d*) whether the breach occurred before (*e*) or after the decease ; but if the covenant had been for payment of a sum by way of liquidated damages, and "heirs" were named in the covenant, the devisee would have been liable, jointly with the heir, in respect of a breach occurring in the lifetime of the covenantor ;(*f*) although, if there were no heir no action would lie against the devisee alone ;(*g*) the heir, if named in the covenant, is liable to the amount of descended assets, whether the breach occur before or after the death of the covenantor. (*h*)

Alteration  
effected by  
1 Will. IV.  
c. 47.

And under the 1 Will. IV. c. 47, (*k*) devisees are, to the extent of the devised assets, rendered liable to be sued upon the covenants of their testators, jointly with the heir taking assets by descent, or solely if there be no such heir.

Damages for  
breach of  
covenant  
when claim-  
able as debt  
in adminis-  
tration suit.

And it has been held, in a recent case, (*l*) that damages upon covenants for title, in which the heir was named, for breaches happening after the covenantor's decease, will, even as against the devisee, be considered as within the meaning of a testamentary charge of *debts* ; but the devisee, or (it is conceived) the heir, in an administration suit, is not bound by the result of proceedings by the \*covenantee against the personal representatives of the covenantor, but may have the question determined in an action to which he is himself a party ;(*m*) nor can interest be claimed prior to the amount of damages being so determined ; but where devisees, having insisted on this right, were unsuccessful in the action, the covenantee was

[\*377]

(*d*) *Wilson v. Knubley*, 7 East, 128.

(*e*) *S. C.*

(*f*) See *Jenkins v. Briant*, 6 Sim. 603, 607.

(*g*) *Hunting v. Sheldrake*, 9 M. & W. 256.

(*h*) See *Shep. Touch.* 177.

(*k*) See ss. 2, 3, 4 and 8. The act came into operation on the 16th July, 1830.

(*l*) *Morse v. Tucker*, 5 Ha. 79 ; *Birmingham v. Burke*, 2 J. & L. 699, and it appears to have been held, in another recent case, that a claimant for unliquidated damages under a breach of covenant, may himself institute a suit for the administration of the covenantor's estate : *Burck v. Cooney*, 14 L. T. 414.

(*m*) *Morse v. Tucker*, *ubi supra* ; and see *Cox v. King*, 9 Beav. 530 ; *Norman v. Stibby*, 9 Beav. 560.

allowed the amount of the damages assessed upon the trial, his costs of defending the ejectment upon which he had been evicted, of an action brought by him against the personal representatives of the covenantor and by the result of which the devisees had refused to be bound, of the action to which the devisees were parties, and of the suit in equity, and also interest on the damages and costs, to be computed from the time when the amount was ascertained and judgment entered up in the action against the devisees.(n)

A remainderman has no equitable claim upon damages recovered by the tenant for life upon breach of covenants for title,(o) as he himself can bring an action for the injury (if any) sustained by him as owner of the reversion.

No apportionment of damages between tenant for life and remainderman.

Where a bill was filed to set aside a conveyance as fraudulent, and the defendant, *pendente lite*, sold parts of the estate and died, and a supplemental bill was filed against his representatives and the purchasers, the latter, being evicted, were held entitled in the suit to repayment of their purchase-money by his representatives; and, as against the plaintiff, to an allowance for lasting repairs and substantial improvements.(p)

The rights arising under a vendor's covenants, (other than covenants for title,) appear to be subject to the same \*rules as have been already considered with reference to a purchaser's covenants.(q)

Purchaser's remedies on vendor's covenants other than for title.

[\*378]

(6.) *Purchaser's remedy in equity, under special circumstances, if title prove defective.*

A purchaser, after conveyance and payment of his purchase-money, may obtain relief in equity against a vendor, who, by fraudulent misrepresentation, has induced him

Purchaser accepting defective title through fraud of vendor,

(n) 5 Ha. 79.

(o) *Noble v. Cass*, 2 Sim. 343.

(p) *Trevelyan v. White*, 1 Beav. 588.

(q) *Vide supra*, p. 360, and authorities cited; and see *Brewster v. Kitchen* or *Kidgūl*, Ld. Raym. 317, 322; and 5 Mod. 369; and *Holmes v. Buckley*, 1 Eq. Ca. Abr. 27; and the remarks on these decisions in *Smith's Leading Cases*, 32, *et seq.*

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relieved in  
equity.

to accept a defective title ;(r) nor need he wait until eviction, but may, at once, claim to have the contract rescinded :(s) even a fraudulent concealment, by the vendor, of a material fact which the purchaser had no means of discovering, might lead to the same result.(t)[1] So, in a modern case, where a purchaser in possession was frau-

(r) *Edwards v. M'Leay*, G. Coop. 308, 312; 2 Swanst. 287; *Berry v. Armstead*, 2 Keen, 221; *Roddy v. Williams*, 3 J. & L. 1; see *Jillard v. Edgar*, 13 Jur. 1114.

(s) G. Coop. 318; 2 Keen, 221.

(t) See G. Coop. 312; *Early v. Garrett*, 4 M. & R. 687, 690; and see 2 Y. & C. C. C. 577; and the judgment in *Small v. Attwood*, You. 455.

[1] If the vendor by his act diminished the value of the purchase to the vendee, and disabled himself from conveying, the vendee will not be required to seek redress at law, nor to accept of title; but on his application the contract will be rescinded and the advance or deposit refunded, though the consideration has not at all been paid, and no title was stipulated to be made until that event. *Lytel v. Breckenridge*, 3 J. J. Marsh. 670. If a vendor represents the quality of the thing, different from what it is, or has no title, the vendee may be discharged from his contract. *Peyton v. Bailey*, 3 Haywood, 141. A false assertion by the vendor as to the mere value of the property he is about to sell without any misrepresentation or deception as to any other matter of fact, is not a sufficient ground of relief to the purchaser, either at law or equity. The law presumes that each party to a contract of sale relies upon his own judgment as to the value of the property sold, where the facts on which the value of such property depends are known to both. *Speiglemeyer v. Crawford*, 6 Paige, 254. Where the vendor of a lot of land secretly intended to sell only a part of the lot, but succeeded in making the vendee understand that he was buying the whole lot; and only part of the lot was included in the deed of conveyance for which the vendee paid the whole consideration intended by him to be given for the whole lot, the court decreed that the vendor execute to the vendee a conveyance for the whole. *Wisswall v. Hall*, 3 Paige, 313. A purchaser in possession under his purchase, buying in an adverse claim, cannot claim a rescission of the contract made with his first vendor, on the ground of the validity of the after-acquired title, and the invalidity of the first, without surrendering back the possession to the first vendor, and taking the chance of opposing the last acquired title to the first. *Grundy's heirs v. Jackson's heirs*, 1 Litt. 13. The existence of an elder adversary patent covering the land purchased, is not a sufficient ground of equity to enjoin the recovery of the purchase money, where the vendor shows an adversary possession of more than twenty years in himself and vendee, and the complainant does not show that the proprietor of the elder patent has asserted his right, or that his right of entry is saved by some of the exceptions in the act of limitations. *Allen v. Phillips*, 2 Litt. 1. See *Denston v. Morris*, 2 Ed. Ch. Rep. 37;



duently induced by the vendor and his solicitor, in the absence of his own professional adviser, to pay the purchase-money and execute covenants for the production of title deeds, while the title to part of the property was under investigation with reference to a known defect, he was held entitled to rescind the contract, to recover his purchase-money with his costs, charges and expenses, and to have the deeds of covenant delivered up to be cancelled.<sup>(u)</sup> So, where a vendor, seemingly from mere mistake, erroneously stated that a will, forming part of the title, had \*been proved, the purchaser, after conveyance, obtained a decree that the will should be deposited with the master, and the vendor was fixed with costs.<sup>(v)</sup>

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In a recent case, where a public way over the estate had been so blocked up under a mere temporary arrangement that it could not be discovered by the purchaser, and the vendor's solicitor (she herself having no personal knowledge of its existence) omitted to disclose the same, but not, as the court considered, "with any intention to do or sanction anything he thought wrong," and the conditions of sale required the purchaser to build a wall which, in fact, interfered with such right of way, it was held, that this was such implied fraud on the vendor as enabled the court to decree a reconveyance ;<sup>(w)</sup> the bill, however, which rested the purchaser's case upon the ground of personal fraud, was, on appeal, dismissed by the lords ;<sup>(x)</sup> they being of opinion that she had no actual knowledge of the circumstances, and that the agent's knowledge could not sustain a charge of personal fraud against the principal ; and that the plaintiff, putting his case on the ground of personal fraud, could not rest it on

Vendor how far responsible for his agent.

(u) *Berry v. Armstead*, 2 Keen, 231.

(v) *Harrison v. Coppard*, 2 Cox, 318.

(w) *Gibson v. D'Este*, 2 Y. & C. C. C. 542.

(x) *Wilde v. Gibson*, 1 H. L. Ca. 605.

*Tallmade v. Wallis*, 25 Wend. Rep. 67; 1 Dana's Rep. 305; 2 Kent's Com. 493; 5 Paige's Rep. 300; 21 Wend. 131; 26 Ib. 107; *Lloyd v. Jewell*, 1 Greenl. Rep. 852. (See Waterman's Amer. Ch. Dig. tit. Vendor and Vendee.)

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Purchaser  
must show  
wilful mis-  
representa-  
tion, *semble*.

any other ground ; and Lord Cottenham cited, and seemed to approve of a case(y) where a lessor having informed his intended lessee, (in answer to an inquiry on the point,) that no public right of way existed over the estate, a bill to rescind the executed lease on the ground of the ascertained existence of such right of way, was dismissed, there having been no wilful misrepresentation.[1]

It may be remarked of one of the last two cases,(z) that the misrepresentation evidently resulted from mere [\*380] \*carelessness in not ascertaining whether certain mark-

(y) *Legge v. Croker*, 1 B. & B. 506.

(z) *Gibson v. D'Este*, *ubi supra*.

[1] Imposition and fraud upon the purchaser by any wilful misrepresentation or concealment, takes the case out of the general rule, and entitles him to be redressed in equity in addition to and beyond the covenants in the deed. *Bumpus v. Platner*, 1 John. Ch. Rep. 213; *Abbott v. Allen*, 2 Ib. 519; *Johnson v. Geer*, Ib. 546; *Chesterman v. Gardner*, 5 Ib. 29; *Gouverneur v. Elmendorf*, Ib. 79. In *Deniston v. Morris*, 2 Ed. Ch. Rep. 27, the defendants sold an estate to one Sandford, with promises of title and a warranty. The latter entered into possession and made improvements in buildings, &c. ; and then defendants would only give him a deed, with covenants as to their own acts. They represented the title as good; and engaged that they would not transfer the mortgage he was to give for the purchase money; so that if the title failed, the same should be restored. Sandford sold his interest to Dickey; and one Jackson sued Dickey and recovered, having a paramount title. Dickey also, was obliged to pay the mortgage; the defendants having, contrary to their promise, transferred it. Dickey failed; and the complainants, as his assignees, sued this bill, alleging that the defendants had funds sufficient in their hands. The court observed that "the difficulty in this case is this, that Sandford is not the party complaining of the fraud; nor indeed, has he been injured by it. He sold the property without fraud, and without covenants for an adequate consideration. According to the statement of the transaction, the vendors became trustees of that part of the purchase money which was secured by mortgage. An implied trust, at least, was created of the purchase money; and such a one as this court is bound to protect and preserve. If, then, there be a trust fund, and trustees of it, for whose benefit does it enure? The title was to be made satisfactory to Sandford and his assigns. A loss resulted in the failure of the title; and this loss has been borne by Dickey; and he, or those standing in his place, are the persons entitled to the benefit of it." See also *Pringle v. Samuel*, 1 Litt. Rep. 46; *Sherwood v. Salmon*, 5 Day's Rep. 439; *Bostwick v. Lewis*, 1 Day, 33, 250; *Norton v. Hathaway*, 1 Day, 255; *Sherwood v. Salmon*, 2 Day, 128; *Munro v. Fludd*, 1 M'Cord's Rep. 122.

stones denoted the centre or the side of the way ; and, of the other, (a) that the lessor had grounds for believing his statement to be correct : in each case the misrepresentation, if discovered in time, would probably have been a sufficient reason for refusing to complete the contract ; but, as observed by Lord Cottenham, (b) there is a marked distinction made by courts of equity between what is necessary to resist a suit for specific performance of a contract, and what is necessary to support a suit to set aside a deed executed and an arrangement completed. It seems that, in such cases, the principal would, as a general rule, be bound by the fraud of the agent ; (c) but not by his mere non-communication of his constructive knowledge, or of knowledge acquired by him otherwise than as agent. (d)

Principal bound by fraud of agent.

Where a re-conveyance is decreed, the purchaser, it appears, will be credited, in addition to his purchase-money, not only with necessary outgoings in respect of the estate, but also with the amount of repairs and improvements, if executed before the discovery of the defect in title, and if their repayment is specially prayed by the bill ; (e) and, probably, of necessary repairs executed during or pending litigation, if specially prayed ; (f) he will also be allowed his costs of the purchase and conveyance, (g) and interest upon all these several sums at the rate of 4l. (h) *per cent.* from the times of their respective payments or expenditure ; and will be debited with such rents and profits as he has, or without wilful default (i) \*might have received ; and with an occupation rent in

Terms on which purchaser is relieved in equity.

[\*381]

(a) *Legge v. Croker*, *ubi supra*.

(b) *Vigers v. Pike*, 8 Cl. & Fin. 645.

(c) See *Wilson v. Fuller*, 3 Q. B. 68, 77; Sug. 274; 1 H. L. C. 615.

(d) *Wilde v. Gibson*, 1 H. L. Ca. 605; and see *Alvanley v. Kinnaird*, 2 Mac. & G. 1, 6.

(e) See *Edwards v. M'Leay*, 2 Sw. 289.

(f) See Sug. 279.

(g) 2 Sw. 289. See the decree.

(h) See 2 Y. & C. C. 581; 5l. *per cent.* was formerly allowed, see Jac. 166.

(i) See the decrees in *Gibson v. D'Este*, 2 Y. & C. C. 581; and *Murray v. Palmer*, 2 Sch. & Lef. 490; but see, *contra*, the judgment, *ibid.* 489.

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respect of any part of the estate which has been in his own possession ;(k)[1] he would also, it is conceived, be compelled to reinstate premises which he has materially altered ; *e. g.*, a private house converted into a shop ;(l) where a purchase was set aside for fraud on the part of the purchaser, and the rents exceeds the interest of the purchase-money, annual rests were directed until the principal should be liquidated.(m)

(7.) *As to purchaser's right to pay off incumbrances out of the unpaid purchase-money.*

Whether he can, after conveyance, retain incumbrances out of unpaid purchase-money.

After the conveyance has been executed, the purchaser may(n) discharge, out of any purchase-money which remains unpaid, (although secured,) any incumbrances which either have been created by the vendor himself, or are covered by his covenants for title ; but not incumbrances paramount to his title, and not covered by his covenants ;(o)[2] and this right, it is conceived, would not,

(k) See 2 Y. & C. C. C. 581.

(l) See Jac. 165.

(m) *Donovan v. Fricker*, Jac. 165.

(n) See *Serjeant Maynard's case*, Freem. Ch. R. 1.

(o) *Thomas v. Powell*, 2 Cox. 394.

[1] But a purchaser, where the contract is rescinded, is not to be charged with what, without wilful default, he might have made : it is not like the case of mortgagees who are thus charged in order to make them sufficiently alert in receiving the rents.

[2] In the case here cited, an estate was sold before a master, under a decree, and the purchaser, under the usual order, had paid his purchase money into the bank, but it was not to be paid out without notice to him, and he took possession, and approved of the title, and the conveyance to him was executed by all necessary parties ; afterwards, but before the money was paid out of the bank, the tenants were served with a writ of right at the suit of an adverse claimant. It was held that the money must be applied under the decree. The court having given the purchaser possession of the estate which he had purchased, and a conveyance under a title which he himself had previously approved, had done all it could for the purchaser, who could not, afterwards, object to the application of the purchase money. But this does not apply to a sale under the court where the rent is represented ; although the money be paid into court and possession be delivered, and a conveyance executed, yet the court will give to the purchaser out of the funds in court a compensation for the misrepresentation. See 2 Sug. on Ven. p. 285.

where security has been given for the purchase-money Chap. XIV. prevail, as against an assignee, for valuable consideration and without notice, and who, previously to taking the assignment, had ascertained from the purchaser the existence of the debt; otherwise, no one could safely take a transfer of a mortgage by a purchaser to a vendor for securing part of the purchase-money; the case seems to be within the principle of one where it was decided, that where a tenant for life with power of sale had sold an estate, and covenanted that it was free from incumbrances, and the money had been paid to the trustees of the settlement \*and invested the purchaser, on discovering the existence of incumbrances, had no claim upon the vendor's life-interest in the money as against an annuitant, to whom, for valuable consideration, and without notice of the fraud committed by the vendor, the trustee of the stock had, at the vendor's request, given an irrevocable power of attorney to receive the dividends;(p) and Lord Thurlow, on appeal, intimated an opinion, (which, however, was extra-judicial,) that (irrespective of the claim of the annuitant,) the purchaser could not have followed the money when deposited with the trustees; the case is cited by Sir E. Sugden as an authority for the proposition that, notwithstanding incumbrances have been fraudulently concealed, "the purchaser has no lien on the purchase-money after it is appropriated by the vendor."(q)

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(8.) *Purchaser's remedy in equity if he buy his own estate—or if lands are omitted from conveyance—and as to further assurance in equity and by statute.*

If it appear that the estate belonged to the purchaser, he can, in equity, recover his purchase-money, although there was no fraud on the part of the vendor, and although the purchaser might have discovered his right from the abstract of title.(r)

Purchaser buying his own estate, relieved in equity.

And it has been held,(s) that a purchaser who, without

Whether so if he buy es-

(p) *Cator v. Lord Pembroke*, 1 Bro. C. C. 301.

(q) Sug. 687.

(r) *Bingham v. Bingham*, 1 Ves. 126.

(s) *Hilchcock v. Giddings*, 4 Pr. 135.

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estate which  
has no ex-  
istence.

Purchaser  
may claim  
in equity  
lands shown  
to him, or  
accidentally  
omitted.  
[\*383]

any fault on the part of the vendor, buys an estate which, in fact, has no existence, (*e. g.*, a remainder expectant on an estate tail which has been barred,) can obtain relief in equity; but the case seems to be considered by Sir E. Sugden as of doubtful authority. (t)[1]

If lands shown to a purchaser are excepted in the conveyance \*under a name by which he did not know them, he can claim them in equity; and by getting in an outstanding legal estate may hold them, even as against a subsequent purchaser for valuable consideration and without notice; (u) and he could, doubtless, enforce a conveyance of them, as against the vendor, or volunteers; he has also, it would appear, the same rights as respects lands accidentally omitted from the conveyance, if shown to him as part of his purchase, (w) or if he can prove an agreement for their purchase sufficient within the statute of frauds; (x) and, as a general rule, where the conveyance is executed for the purpose of giving effect to and executing the agreement, and by fraud, accident, or mistake, it gives to the purchaser less than he is entitled to under the agreement, he may call upon the court to rectify the defective conveyance, and give him all that the agreement comprehended; but where the original agreement is of doubtful construction, and the conveyance is definite and unequivocal, it is not easy to avoid the conclusion

(t) See Sug. 272.

(u) *Ozwick v. Brockett*, 1 Eq. Ca. Abr. 355.

(w) See *Cass v. Waterhouse*, Prec. Ch. 29.

(x) *S. C.*; and see *Nelson v. Nelson*, Nels. Ch. R. 7, which, however, was a case between principal and agent.

[1] "Both these cases," says Sugden, "when they arise, will, it is apprehended, deserve great consideration before they are decided in the purchaser's favor. The decision must be the same whether the money is actually paid or only secured." If vendor, without fraud, is incapable of making a title, the vendee will be entitled to his purchase money paid, with interest. *Cox's heirs v. Strobe*, 2 Bibb, 275. If there be any doubt or difficulty as to the title, it will be referred to a master to examine and report upon it. *McComb v. Wright*, 4 Johns. Ch. Rep. 669. A party has no remedy in equity, on the mere ground of a failure of title, if he has taken no covenants to secure the title, and there is no fraud in the case. *Chesterman v. Gardner*, 5 Johns. Ch. Rep. 29; *Gouverneur v. Elmendorf*, 5 Johns. Ch. Rep. 79.

that the latter may be the best evidence of the actual agreement.(y)[1] Chap. XIV.

So, also, he may in equity, under the covenant for further assurance, require the vendor to perfect a defective title, even by conveying any interest in the estate which he may have subsequently acquired for valuable consideration ;(z)[2] and the right seems to exist independent.

May require vendor to convey subsequently acquired interests.

(y) *Per V. C. Wigram, Humphries v. Horne*, 3 Ha. 277, 278. If the purchaser's bill in such a case is dismissed, and purchase-money has been paid by him into court, and not invested, he must pay interest upon it to the vendor, although it has been unproductive, *S. C.*

(z) *Taylor v. Debar*, 1 Ch. Ca. 274.

[1] When articles of agreement are entered into by which a conveyance is covenanted to be made, and afterwards a conveyance is made, and accepted, which differs, in some respects, from the articles, the deed of conveyance, which is the consummation of the agreement, shall be taken for the ultimate intent of the parties, and prevail over the articles. But if the deed is accepted under a misapprehension, occasioned by the fault of the plaintiff, however strict the law might be, they would be entitled to relief in equity. *Crotzer v. Russell*, 9 Serg. & Rawle, Rep. 78, per Tilghman, C. J. Where the articles of agreement stipulated for the conveyance of a tract of land, and also to convey "all the right, title, claim, and interest, of other persons, in another tract of land;" held that in an action for the purchase-money, the defendant might show by the articles, what the agreement was, although a deed had been given and accepted of the first tract; because that was but a fulfilment, in part, of what the vendor had covenanted to do, by the articles. Without this evidence, the court and jury would be unable to decide what would be the equity of the case between the parties. *Brown v. Moorhead*, 8 Serg. & Rawle Rep. 569. In an action on a bond given for the consideration of land, contracted for by articles, which was stipulated to contain 225 acres; and the deed subsequently executed described the land by boundaries, calling it 225 acres; held, that it was competent for the defendant to show in evidence any deception practised in the outset of the transaction. He was admitted to prove that at the execution of the articles, the plaintiff asserted that the land contained 225 acres, and said he would make his assertion good. *Frederick v. Campbell*, 14 Serg. & Rawle, 293.

[2] Where a grantor having no title, conveyed with warranty, by deed duly recorded, and he subsequently acquired a title and conveyed to a stranger, it was held that the second grantee was estopped to aver that such grantor was not seized at the first conveyance. *White v. Patten*, 24 Pick. Rep. 324. One Weston made a deed to one Webster; the demandants subsequently levied an execution upon the premises as belonging to Webster, and the latter afterwards released to the demandants. It appeared that Weston, had no title at the time he executed his deed, but afterwards he acquired a title, and afterwards conveyed to the tenant in fee. And it was held that Weston, by his deed and covenant (although it was

ly of such a covenant;(a) and may be enforced against the vendor's representatives, and parties claiming under him \*for valuable consideration with notice;(b) and the rule seems to be the same even when he has no estate in the land at the date of the conveyance: it was, however, decided in an old case,(c) that such an equity could not be enforced against the heir, but there seems to be no good ground for such a distinction, and it has been judicially disapproved of by Sir *E. Sugden*.(d)

In *Noel v. Bewley*,(e) a man conveyed his contingent remainder in fee by way of mortgage, and covenanted for further assurance; and the remainder having been destroyed by his mother, the tenant for life, (who was also the reversioner in fee,) he was held liable in equity to perfect the security out of an interest in the estate which he took under her will; so, where a man who was supposed to have a reversion in fee, but in fact had no estate in the land, executed what purported to be a conveyance of the same for valuable consideration, he was held liable, under his covenant for further assurance, to convey the estate on its subsequently coming to him as heir at law :(f) the cases seem, as observed by Sir *E. Sugden*, C.,(g) "to establish this, that if a man sells an estate, and the title is afterwards defeated, but subsequently he acquires the same lands under another title, there is an equity arising out of the contract to fasten it upon the new title:" but, in applying this rule, the word *estate* must be strictly construed, for evidently no such equity could exist where the contract had been for the purchase professedly of a contingent interest at a price fixed with a view to the contingency.

(a) See 3 Sim; *Seabourne v. Powell*, 2 Vern. 11.

(b) *Jennings v. Blincorne*, 2 Vern. 609.

(c) *Morse v. Faulkner*, 1 Anst. 11.

(d) See 1 Dru. & W. 159.

(e) 3 Sim. 103.

(f) *Smith v. Baker*, 1 Y. & C. C. C. 223.

(g) See *Jones v. Kearney*, 1 Dru. & W. 159.

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not of general warranty) was estopped to make any claim or title to the land, and that the tenant claiming subsequently under Weston, was privy in estate, and bound by the estoppel. *Fairbanks v. Williamson*, 7 Greenl. Rep. 96.



It seems probable that the purchaser could come into equity for further assurance, even if the conveyance were \*by a mere expectant heir professedly selling the estate in the lifetime of his ancestor.(h)

A conveyance by lease and release, containing no precise recital of the vendor's seisin, but only a recital that he is "legally or equitably entitled to the property," cannot operate by way of estoppel so as to pass the after-acquired legal estate.(i)[1]

Where a voidable estate has either before or after the passing of the 3 & 4 Will. IV. c. 74, been created by a tenant in tail in favor of a purchaser for valuable consideration, any subsequent assurance under the act, (other than a lease not requiring enrolment,) whatever may be its object or the extent of estate intended to be thereby created, confirms the previous voidable estate to the extent to which the tenant in tail alone, or the tenant in tail with the consent of the protector, (if there be one, and he consent to such subsequent assurance,) could confirm

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Although the sale were of a mere expectancy  
*semble.*

[\*385]

No estoppel by doubtful recital.

Voidable estate created by tenant in tail; confirmation of by subsequent assurance.

(h) See Sug 1023; 1 Fonb. on Eq. b. i. ch. 4, s. 2; *Wethered v. Wethered*, 2 Sim. 183; *Harwood v. Tboke*, 2 Sim. 192; but see *Carellon v. Leighton*, 3 Mer. 667; *Jones v. Roe*, 3 Durn. & E. 93; an equitable charge upon an expected legacy was recently supported in *Bennett v. Cooper*, 9 Beav. 252.

(i) *Right v. Bucknell*, 2 B. & Ad. 278; and see Sug. 1018, 1023; and *Lloyd v. Lloyd*, 4 Dru. & W. 354; *sed aliter*, if there be a particular recital of title, *Bensley v. Burdon*, 2 Sim. & St. 519; on appeal, 8 L. J., Ch. 85; this case is said to be overruled by *Right v. Bucknell*, see 4 Dru. & W. 369, *sed qu.*

[1] In the case of *Right v. Bucknell*, cited in the text, a man having an equitable estate under a contract, conveyed it by lease and release, to a mortgagee in fee, reciting that he was legally, or equitably entitled to it, and afterwards obtained a conveyance of the legal fee to himself, and mortgaged it to another person, who had no notice, and it was held there was no estoppel to prevent the mortgagee of the legal fee from maintaining his title against the mortgagee of the equitable fee. The grantor would be estopped to say that he was not seized in fee in the estate which he had conveyed with warranty. And the tenant who claims the estate as the grantee of such grantor, by a subsequent conveyance of the same, is also estopped to say, that his grantor was not seized of the estate which he had conveyed, inasmuch as the grantor would himself be estopped, if he were a party. *Somes v. Skinner*, 3 Pick. Rep. 60; *White v. Patten*, 24 Pick. 324.

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the same under the act : but this is not to affect any purchaser for valuable consideration, to whom such subsequent assurance may be made without express notice of the previous voidable estate ;(k) so, before the act, a fine by a tenant in tail confirmed his previous voidable conveyance.(l)

[\*386] "(9.) *As to the general rights and liabilities of purchaser under the conveyance.*

Purchaser's  
right to rent,  
if property  
in lease, &c.

If the conveyance be executed during the existence of a tenancy, the purchaser of the reversion thereupon becomes entitled to the accruing(m) and future rent, and may recover it by action, or (after giving notice of the conveyance) by distress ;(n) but he cannot recover arrears due before the conveyance,(o) or subsequent rent which the tenant, in ignorance of the conveyance, has paid to the vendor :(p) so, it would appear, the purchaser of a part only of a rent-charge, may, after conveyance, distrain for his proportionate part.(q) The act for the apportionment of rents(r) does not appear to apply to the case of a sale, or, as between a vendor and purchaser, to affect the latter's right to accruing rents.(s)

And to sue  
for breach of  
covenant.

So, if the tenancy be under a lease by deed(t) for a term which is subsisting at the date of the conveyance, the purchaser of the reversion may sue upon breaches of covenants which occurred before the conveyance ;(u) but not, it would seem, if the lease be determined before the

(k) 3 and 4 Will. IV. c. 74, s. 38 : and see as to bankruptcy of a tenant in tail who has created a voidable estate, sect. 62 of act ; and see as to confirmation of the voidable estates of purchasers under the bankruptcy of a tenant in tail, sects. 60, 61, and 65 of act ; and 12 and 13 Vict. c. 106, sect. 208.

(l) *Lloyd v. Lloyd*, 4 Dru. & W. 354.

(m) *Flight v. Bentley*, 7 Sim. 149.

(n) *Moss v. Gallimore*, Doug. 266, although the rent was due at the date of the notice.

(o) *Flight v. Bentley*, 7 Sim. see p. 151.

(p) 4 Anne, c. 16, s. 10 ; *Birch v. Wright*, 1 Durn. & E. see 385.

(q) *Rivis v. Watson*, 5 M. & W. 255.

(r) 4 and 5 Will. IV. c. 22.

(s) See and consider *Browne v. Amyot*, 3 Ha. 173.

(t) *Standen v. Christmas*, 10 Q. B. 135.

(u) Sugd. 219.

conveyance, although the tenancy continue(*w*)[1] his right to sue exists although he have purchased the reversion only of part of the demised premises ;(*x*) but he then cannot enter for conditions broken ;(*y*) but such entry may be made by the purchaser of part of the reversion of all the \*premises ; *e. g.*, if a termor underlet to A., and then assign to B. the original term wanting one day, B. may enter for condition broken by A. :(*z*) and in none of the above cases is it necessary that the tenant should attorn to, (*a*) or otherwise acknowledge the title of the purchaser : where the lease is by writing not under seal, the right to sue upon it as a contract does not pass with the reversion, and the lessor may, after conveying the reversion, sue the lessee in respect of breaches of agreement, (*e. g.* to repair the premises,) committed during the tenancy but subsequently to the conveyance of the reversion ;(*b*) but the assignee of the reversion may maintain *assumpsit* against the tenant for use and occupation. (*c*)

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As to re-entry.

[\*387]

And, under a recent act, where the immediate reversion on a lease is surrendered or merged, the next estate is to be deemed the reversion as respects both rights and liabilities. (*d*)

Next estate is now the reversion.

And where the purchaser is himself lessee, the execution of the conveyance at once determines all the covenants in the lease which subsisted between himself and the vendor as lessee and lessor. (*e*)

Purchaser's rights and liabilities, as lessee, cease on conveyance.

It has been held, that the mere retention by the vendor of the actual possession of the property, subsequently to

Vendor retaining possession, not liable for use

(*w*) See *Johnston v. St. Peter's, Hereford*, 6 Nev. & M. 106, 115.

(*x*) *Twynnam v. Pickard*, 2 B. & Ald. 106.

(*y*) *Wright v. Burroughes*, 4 D. & L. 438; see p. 448.

(*z*) *S. C.*

(*a*) See 4 Anne, c. 16, sect. 9; Doug. 269.

(*b*) *Bickford v. Parson*, 5 C. B. 920; *Standen v. Christmas*, 10 Q. B. 135.

(*c*) *S. C.*

(*d*) 8 and 9 Vict. c. 106, s. 9.

(*e*) 1 Bli. 69.

[1] For the tenant is liable to his original landlord, on his breach of covenant, and cannot also be liable to the purchaser, the new landlord, for the same damage arising from the breach of his implied undertaking.

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and occupa-  
tion.

Purchaser's  
will, how af-  
fected by  
conveyance.

[\*388]

Conveyance  
of equitable  
estate, why  
requisite.

Conveyance  
with power  
of redemp-  
tion—when  
not a mort-  
gage.

the execution of the conveyance, will not subject him to an action by the purchaser for use and occupation.<sup>(f)</sup>

We have seen<sup>(g)</sup> that, under the old law, where a testator, having entered into a contract for purchase which was not binding on the vendor, devised the estate, such devise was inoperative on any interest which he subsequently acquired in the property; although a case of \*election might, in some cases, be raised against the heir: so, also, if, having contracted for an estate, he devised it, and then took a conveyance in terms inconsistent with the contract, the devise was thereby revoked; but that a devise contained in a Will coming within the provisions of the recent act of 1 Vict. c. 26, will pass to the devisee the rights of the testator, whatever they may be, under the subsequent conveyance.

As we have already seen, even in the case of a mere equitable estate, a conveyance is necessary to enable the purchaser to enforce, as against third parties, any equities attaching to the property.<sup>(h)</sup>[1]

And we may here remark, that if a *bona fide* sale and absolute conveyance are accompanied by a power reserved to the vendor to repurchase the property, this will not turn the transaction into a mortgage, if such does not appear to have been the intention of the parties; and the

(f) *Tew v. Jones*, 13 M. & W. 12.

(g) *Supra*, 126.

(h) See *Tusker v. Small*, 3 M. & C. 70; *per* Lord Cottenham, *supra*, p. 115.

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[1] The general rule is that neither the vendor nor the purchaser can involve third parties in a proceeding to enforce a specific performance any more than they could be made parties to an action for a breach of contract. Even where a mortgagee, claiming under the seller, is not willing to convey to the purchaser, without having competent authority for so doing, he cannot be made a defendant to the purchaser's bill for a specific performance, nor can any person entitled to an interest in the equity of redemption be joined. The mortgagee is only subject to be redeemed and is a stranger to the contract, and has no right to dispute the title, and the purchaser has no right to redeem until his contract is completed. The purchaser, of course may, in a suit against the seller alone, if he is entitled to the equity of redemption, compel him to redeem and to obtain a conveyance from the mortgagee. See 1 Sug. on Ven. 263, 264.

test of such intention seems to be the existence or non-existence of a debt from the original vendor in respect of the sum named as the price for such repurchase : if there is no debt there is no mortgage.(i)[2]

(i) See *Perry v. Meadowcroft*, 4 Beav. 197, affirmed, 203; *Williams v. Owen*, 5 M. & C. 303.

[2] "As to what constitutes a mortgage," says Story, (2 Story's Eq. Juris. secs. 1018, 1019,) there is no difficulty whatever, in courts of equity, although there may be technical embarrassments at law. The particular form, or words of the conveyance, are unimportant; and it may be laid down as a general rule, subject to few exceptions, that wherever a conveyance, assignment, or other instrument transferring an estate, is originally intended between the parties as a security for money, or for any other incumbrance, whether this intention appear from the same instrument, or from any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations thereof. Even parol evidence is admissible, in some cases, as in cases of fraud, accident, and mistake, to show that a conveyance, absolute on its face, was intended between the parties, to be a mere mortgage, or security for money. So inseparable indeed, is the equity of redemption from a mortgage, that it cannot be disannexed, even by an express agreement of the parties. If therefore it should be expressly stipulated, that unless the money should be paid at a particular day, or by or to, a particular person, the estate should be irredeemable, the stipulation would be utterly void. In this respect, courts of equity act upon the same principle, which is avowed in the civil law; and most probably it has been borrowed from that source. A distinction is also taken, like that in the civil law between a conditional purchase, or an agreement for a re-purchase, and a mortgage properly so called. The former, if clearly, and satisfactorily proved to be a real sale, and not a mere transaction to disguise a loan, will be held valid; although every transaction of this sort, is watched with jealousy."

A transaction constituting a mortgage cannot be converted into a sale, therefore the leaning of courts of equity in doubtful cases is against the lenders of money, and they hold such cases rather to be mortgages than conditional sales. *Dougherty v. M'Colgan*, 6 Gill & John. 278. Where land is conveyed by an absolute deed, and the vendee, at the same time, delivers to the vendor, a contract by which he agrees to re-convey the premises by a specified time, upon the repayment of the purchase-money with interest, the circumstances furnish presumptive evidence that the deed, although absolute upon its face, was intended as a mortgage, and it will be so held in equity. *Marshall v. Stewart*, 17 Ohio Rep. 356. A parol agreement between a grantor and grantee, at the time of the execution and delivery of a deed of bargain and sale of lands, that the grantee should, at a subsequent time, give to the grantor a bond, to re-convey upon the payment of a sum of money, and a bond subsequently given in pursuance of such agreement, does not make the conveyance a mortgage.

Chap. XIV. *Lund v. Lund*, 1 N. H. Rep. 39. Where the substance of a contract is, to secure one against liability, it will be construed a mortgage, without regard to its form. *Webb v. Patterson*, 7 Humph. Tenn. Rep. 431. Where a conveyance of land is made upon condition that it shall be void upon the payment of a sum of money by the grantor, if the conveyance is in fact made to secure the payment of a debt, for which the grantee has a remedy against the person of the debtor, the conveyance is to be deemed a mortgage. But where the conveyance is not intended as a security, it must be deemed a conditional sale. *Page v. Foster*, 7 N. H. Rep. 392. Though a writing may purport on its face to be an absolute or a conditional sale, if it was obtained by any fraudulent device, or upon a usurious contract, or was really intended as security for a loan; and any such facts are charged by bill in equity and proved, and they may be proved by the defendant's express admission, and will be taken as admitted, if he evades the charge, or only gives a general response to a specific allegation, the writing will be treated as a mere mortgage or evidence of a pledge. *Bright v. Wagle*, 3 Dana, 254. Where a debtor conveyed his farm to his creditor for the amount of his debt, which was about the value of the farm, by an absolute deed, with covenants of warranty, and the creditor gave up and discharged the securities which he held for his debt, and, on the same day, gave to the grantor a writing to the effect that if such grantor could find a purchaser for the farm within one year, he should be entitled to all the surplus which he could obtain for the same beyond the amount of the debt for which it had been conveyed, and the interest thereon. Held, that the writing thus given was not such a defeasance of the conveyance as necessarily to constitute it a mortgage; even if it was given at the time of the execution of the deed, and in pursuance of a previous agreement to that effect. *Holmes v. Grant*, 8 Paige, 243. To enable the court to declare an absolute bill of sale to be but a security in the nature of a mortgage, the proof must be clear and convincing. Loose declarations of a trust, especially after great lapse of time, will not be allowed to overturn the written contract of the parties. *Freeman adm'r., v. Baldwin*, 13 Ala. Rep. 246. A bill of sale made absolute on its face and signed by the vendor, attached was a condition signed by the vendee, which was in these words: "The condition of the above obligation is such that if the said H. shall well and truly pay to the said C., the above mentioned sum of money, without interest by the first of January, 1827, then, &c. Held by the court that it was not a mortgage on its face, but a sale with liberty to re-purchase. *Hickman v. Cantrell*, 9 Yerger, 172. See Waterman's Amer. Ch. Dig., tit. *Vendor and Vendee*.

## \*CHAPTER XV.

AS TO THE EFFECT OF THE CONVEYANCE ON THE  
ADVERSE RIGHTS OF THIRD PARTIES.

1. *Purchaser without notice, protected by legal estate against prior claimants.*
2. *With mere equitable title, postponed to prior equitable claimants.*
3. *How far protected against defective execution of powers—against prior claimants who have encouraged him to purchase—and by statute in various cases.*
4. *As to priority under the Registration Acts.*
5. *As to notice—what it is—how it may be proved—and its effect—of void or voidable estates, and fraudulent or voluntary conveyances—equitable relief against purchasers with notice.*
6. *As to contribution to paramount charges.*
7. *Right of third parties after conveyance in various cases.*

(1.) WHERE two persons have, in conscience, an equal claim to the same property, equity will not interfere against the one who acquires a legal right to hold it; even although his equitable title be of later date than of his opponent.(a)[1]

Where equities are equal, legal estate prevails.

(a) *Ozwick v. Plumer*, Bac. Abr. Mortgage, E. s. 3.

[1] Hence, in the case here cited, where A. covenanted to surrender lands to uses, which were enjoyed accordingly, although no surrender was made; and A. thirteen years afterwards surrendered the same lands to B. for valuable consideration, without notice of the covenant, B. was holden to be entitled to the lands, and the covenantees were left to their remedy at law.

Of two equitable incumbrancers he who hath the preferable right to call for the legal estate is entitled to the preference, though he hath not actually got it in, nor obtained an assignment, nor even possession of the deed conveying the outstanding legal title; and though his lien is subsequent in date to the other incumbrance. *Williamson v. Gordon's ex'rs.*, 5 Munf. 257.

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Purchaser without notice, paying purchase-money and acquiring legal estate under the conveyance,

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or getting it in by deed subsequent to conveyance, acquires indefeasible title.

Although vendor had no title in equity.

The execution of a conveyance vesting the legal estate in a *bona fide* purchaser for valuable consideration, or in his trustee, will, therefore, render his title indefeasible as against all equitable claimants, even for valuable consideration, \*of whose claim he had no notice prior to the execution of the conveyance,(b) and actual payment of the purchase-money :(c) and where the contract has been completed by a conveyance which proves defective, by reason of some prior conveyance, charge, or incumbrance, the purchaser may, at any subsequent period, get in any outstanding legal estate, (unless held expressly in trust for an adverse claimant,(d) and use it against all parties of whose claims he had no notice at the time of the completion of his purchase :(e) where the conveyance is executed and the purchase-money is secured, he may come into equity to have it employed in discharge of newly discovered incumbrances,(f) if created by the vendor or covered by his covenants for title ;(g) and where the conveyance has been executed, and part only of the money paid, before notice, he may, it is conceived, clearly avail himself of the legal estate as a security to the extent of the sum so paid.

And, for the above purposes, it is immaterial that the vendor has no equitable interest in the property :—a bare trustee, or a vendor whose apparent equitable title depends upon a forged instrument,(h) can make a good title to a purchaser paying his money without notice, and then, or subsequently, acquiring the legal estate.[1]

(b) *Wigg v. Wigg*, 1 Atk. 382, 384.

(c) *Tburrill v. Naish*, 3 P. Wms. 307; (where the money being secured by bond was held insufficient;) *Jones v. Stanley*, 2 Eq. Ca. Abr. 685, pl. 9; *Story v. Lord Windsor*, 2 Atk. 630; see *Davies v. Thomas*, 2 Y. & C. Exch. 234.

(d) *Saunders v. Dehew*, 2 Verm. 271.

(e) *Stanhope v. Earl Verney*, 2 Ed. 81; and Mr. Butler's not to Co. Litt. 290, b. n.; *Willoughby v. Willoughby*, 1 Durn. & E. 763; and see *Jones v. Smith*, 1 Ha. 43; and 1 Ph. 244; as to the priority acquired by registration, *vide infra*.

(f) 3 P. Wms. 307.

(g) *Supra*, 381.

(h) See *Jones v. Powles*, 3 M. & K. 581.

[1] In *Jones v. Powles*, to which reference is here made, the seller's



But the legal estate will not protect a purchaser against the claims of persons whose prior right to its protection \*was known to him before the completion of the purchase, even although the extent of such claims were unknown; for instance, where A., knowing that B. had a charge on the property, accepted a mortgage of the estate, relying on the mortgagor's covenants, and then got in an old outstanding term for years, it was held that B., having, in respect of A.'s notice of the first incumbrance, a preferable right to require an assignment of the term, was entitled to priority not only in respect of such first incumbrance, but also in respect of a subsequent charge of which A. had no notice at the date of his advance.(i)

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But notice of another having better right to call for legal estate, is notice of all his equities.

[\*391]

And it seems that a purchaser who has completed without notice of a prior incumbrance, may get in the legal estate even from a trustee or satisfied mortgagee having notice of such incumbrance, and will be entitled to avail himself of its protection;(k)[1] yet it had been doubted

Whether legal estate, got in from trustee who has notice of prior claim, is available,

(i) *Willoughby v. Willoughby*, 1 D. & E. 763.

(k) See Lord Hardwicke's judgment in *Willoughby v. Willoughby*, 1 D. & E. 763; *Peacock v. Burt*, 13 L. J. 35; and see Sugd. 786, where the point is said to be clear.

equitable title depended upon a forged will which was produced. It was suggested by the court, that the purchaser was not entitled to its protection, but this view was ultimately abandoned. The court observed, that its impression at the opening of the case was, that the protection of the legal estate extended only to cases where the title of the purchaser for valuable consideration, without notice, was impeached by reason of some secret act or matter done by the vendor, or those under whom he claimed; but upon full consideration of all the authorities, and the dicta of judges and text writers, and the principles upon which the rule is grounded, the court was of opinion that the protection of the legal estate was to be extended, not merely to cases in which the title of the purchaser, for valuable consideration, without notice, is impeachable, by reason of a secret act done, but also to cases in which it is impeached by reason of the falsehood of a fact of title asserted by the vendor, or those under whom he claims, where such asserted title is clothed with possession, and the falsehood of the fact asserted, could not have been detected by reasonable diligence.

[1] "The importance of obtaining an assignment of all outstanding terms," says Sugden, (3 Sug. on Vend. 43,) "cannot be too strongly impressed on purchasers. If a purchaser has no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior charge or incumbrance, and if he also takes an assignment of

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whether the trustee or mortgagee can safely make the conveyance:(*l*) and if the trustee have executed a declaration of trust in favor of the incumbrancer, and the purchaser have notice of such declaration at the time of getting in the legal estate, he will lose the benefit of its protection.(*m*)

Legal estate got in from unsatisfied incumbrancer, available against subsequent incumbrancers.

But it is clear that a purchaser by paying off, and getting in a legal estate from, an unsatisfied mortgagee, may hold it as against all mesne incumbrances of which he had no notice at the time of completion; and this may be done *pendente lite*, at any time before a decree to settle priorities.(*n*)

(*l*) See 1 D. & E. 771; and *Ex parte Knott*, 11 Ves. 613.

(*m*) *Saunders v. Dehew*, 2 Vern. 271; *Allen v. Knight*, 5 Ha. 272, affirmed, 11 Jur. 527.

(*n*) *Belchier v. Renforth*, 5 Bro. P. C. 292; and see 11 Ves. 619: the general doctrine is disapproved of by the present Registration Commissioners, and will probably eventually be destroyed by a general registration act.

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the term to a trustee for him or to himself, where he takes the conveyance of the inheritance to his trustee; in both these cases, he shall have the benefit of the term to protect him; that is, he may make use of the legal estate of the term to defend his possession, or, if he has lost the possession, to recover it at common law, notwithstanding that his adversary may, at law, have the strict title to the inheritance." See *Williamson v. Gordon's ex'rs.*, 5 Munf. Rep. 257.

Lord Hardwicke was of opinion that the protection arising from a term of years, assigned to a trustee for a purchaser, should extend generally to all estates, charges and incumbrances, created intermediate between the raising of the term and the purchase. See 1 Term Rep. 768. "And this doctrine," says Sugden, (3 Sug. on Vend. 44,) "unqualified as it is, seems correct. For, as the term will prevail over a strict title to the inheritance, it will, of course, be a protection against judgments, mortgages, and all other incumbrances and estates less than a fee; and it may, in like manner, be used as a shield against an act or commission of bankruptcy."

In the case of *Peacock v. Burt*, here cited, there was a first mortgagee with the legal estate, a second equitable mortgagee who had given notice to the first, and then a transfer of the first mortgage to a third person, who advanced a further sum to the mortgagor upon the transfer, and had no notice of the second mortgage, and afterwards advanced further sums without notice; of course it was held that the mortgagee of the legal estate, without notice, could hold for all the money advanced against the equitable mortgagee, and a purchaser without notice being safe, although the seller to him had notice.

\*And where a purchaser, not having got in an outstanding legal estate, has nevertheless the best right to call for it, he will in equity be entitled to its protection.<sup>(o)</sup>[1]

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Best right to call for legal estate, a protection in equity.

And, as a general rule, a court of equity will not act adversely to a *bona fide* purchaser who has taken what purported to be a conveyance of the legal and equitable estates, or, perhaps, of such an equitable estate as apparently gave him an absolute and indefeasible right, (either immediately, or upon payment of a subsisting incumbrance,) to call for the legal estate, and has paid his purchase-money without notice of adverse claims;<sup>(p)</sup> the rule, however, has been held to be different where the adverse claimant has a legal title;<sup>(q)</sup> but this doctrine has been disapproved of, and is opposed to decisions by Sugden, C.<sup>(r)</sup> However, it seems probable, notwithstanding some old authorities to the contrary, that when a *bona fide* purchaser subsequently resorts to *fraud* in order to perfect his title, equity will interfere for the purpose of depriving him of the advantage he has thus acquired.<sup>(s)</sup>

Equity will not in general act against *bona fide* purchaser without notice.

(2.) *Purchaser with mere equitable title, is postponed to prior equitable claimants.*

Where the purchaser has neither taken a conveyance of the legal estate, nor such a conveyance of the equitable

As between mere equitable claimants, prior

(o) See *Wilker v. Bodington*, 2 Vern. 599; *Ex parte Knott*, 11 Ves. 618; *Bowen v. Evans*, 1 Jo. & L. 264.

(p) See and compare *Jerrard v. Saunders*, 2 Ves. J. 454; *Gail v. Osbaldeston*, 1 Russ. 158; *Head v. Egerton*, 3 P. Wms. 281; *Att.-Gen. v. Backhouse*, 17 Ves. 290; *Jackson v. Rowe*, 4 Russ. 514; and V. C. K. B.'s judgment in *Penny v. Watts*, 13 Jur. 459.

(q) See *Williams v. Lambe*, 3 Bro. C. C. 264; *Collins v. Archer*, 1 Russ. & M. 264.

(r) See *Payne v. Compton*, 2 Y. & C. 461; *Bowen v. Evans*, 1 J. & L. 178, 264; *Joyce v. DeMoleyns*, 2 J. & L. 374; but see *Titley v. Davies*, 2 Y. & C. C. C. 399.

(s) Sug. 1020.

[1] In the case of *Wilker v. Bodington*, here referred to, there was, 1st, an act of bankruptcy by A.; 2ndly, a settlement for valuable consideration by him, without notice to the parties of the act of bankruptcy; and 3dly, a commission against him. Although the commission overreached the settlement, yet the persons claiming under it were held to be entitled to the benefit of an outstanding term created prior to the bankruptcy.

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title pre-  
vails.

[\*393]

Mortgagees  
by deposit,  
bound by  
secret trust.On purchase  
of equitable  
interest in  
land, no  
priority  
acquired by  
notice to  
owner of  
legal estate.Concealed  
incum-  
brance  
thrown  
wholly on  
puisse equi-  
table pur-  
chaser.

estate as would seem to give him an absolute and indefeasible \*right to call for the legal estate, the ordinary rule of equity, "*qui prior est tempore potior est jure*," will, it appears, be allowed to operate in favor of an adverse claimant; so that where a mortgagee lent money upon a conveyance of what he knew to be a mere equity of redemption, it was held by Lord Thurlow, that he must be postponed to mesne incumbrancers of whom he had no notice;(t) and the decision has been several times recognized by Lord Eldon;(u) so, also, where, in a recent case, bankers took an equitable mortgage by deposit of title deeds of an estate which was subject to a secret trust of which they had no notice, it was held, that such trust must prevail against their security;(w) so, a purchaser of a legacy takes subject to the liability to refund for payment of debts.(x)

And it has been decided in several cases,(y) that, as respects equitable estates in land, the priority of a purchaser or incumbrancer is not affected by his giving or neglecting to give notice of his purchase or security, to the trustees, mortgagees, or other persons in whom the legal estate may happen to be vested; and that the ordinary rule, as to notice of assignments of choses in action, does not apply.

So, where the property is subject to a concealed incumbrance it seems that a purchaser of part, having merely the equitable estate, may throw the entire charge upon a subsequent innocent purchaser of the equitable estate in the residue.(z)[1]

(t) *Beckett v. Cordley*, 1 Bro. C. C. 353.

(u) See 1 Gl. & J. 243; 6 Ves. 192; 2 Russ. 214; and see *Jones v. Jones*, 8 Sim. 642, and see *Thurville v. Naish*, 3 P. Wms. 308.

(w) *Manningford v. Tbleman*, 1 Coll. 670, and see *Att.-Gen. v. Flint*, 4 Ha. 156.

(x) *Jennings v. Bond*, 2 J. & L. 720.

(y) *Peacock v. Burt*, Coote on Mortgages, 569; *Jones v. Jones*, 8 Sim. 633; *Wilshire v. Rabbits*, 14 Sim. 76; *Wilmot v. Pike*, 5 Ha. 14; *Bugden v. Rignold*, 2 Y. & C. C. C. 392.

(z) See *Hartly v. O'Flaherty*, Llo. & G. tem. Pl. 208, 216; *Averall v. Wade*, Llo. & G. tem. Sug. 252.

[1] A man seized of estates A. and B. both subject to a judgment debt

\*Incumbrances in favor of a charity seem to be subject to the same rules as those in favor of a private individual; except that notice to the first purchaser is said to bind subsequent purchasers without notice.(a)

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Rule as to priority how far applicable as against charities.

(3.) *Purchaser, how far protected against defective execution of powers;—against prior claimants who have encouraged him to purchase;—and by statute in various cases.*

Equity will supply the defective execution of a power, if the defect consist merely in the non-observance of some required formality;(b) but not if such formality be positively required by the legislature:(c) nor can it supply a defect which goes to the very nature of the power; as where a power to appoint by will is attempted to be executed by deed:(d) and the legislature has expressly excluded the interference of equity, where a contract by a tenant in-tail is not perfected in manner required by the 3 & 4 Will. IV. c. 74.(e)[1]

Purchaser how far relieved against defective execution of powers.

(a) *East Grimsted case*, Duke's Charitable Uses, 640; a mere length of possession was no protection in equity, before the late Statute of Limitations, to a purchaser who bought with notice of the charitable trust, *Att.-Gen. v. Christ's Hospital*, 3 Myl. & K. 344; as to the effect of the statute, *vide supra*, 190.

(b) See 2 Sug. Pow. 94, 6th ed.

(c) Sug. 1024.

(d) *Reid v. Shergold*, 10 Ves. 370; *Archibald v. Wright*, 9 Sim. 161.

(e) See sect. 47.

settles A. for valuable consideration, without noticing the judgment. The judgment creditor would be compelled to go against estate B., and the persons claiming under the settlement, would be entitled to have the settled estate exonerated at the expense of the unsettled estate: the judgment binds both, and where there is a settlement of part of an estate, as if free from incumbrances, equity will throw the whole on the unsettled part, which still belongs to the original owner. If there is a covenant that the estate is free from incumbrances, or even a mere declaration that the estate was free from incumbrances, there can be no doubt that such a declaration would throw the incumbrances on the unsettled estates. A covenant of this nature, is enforced by equity, not by giving damages, because equity does not give damages, but by specifically doing that which ought to be done. By such a covenant therefore, the judgment would be thrown altogether on the unsettled estate.

[1] If there be a defective execution, or attempt at execution, of a mere

The purchaser will also be protected in equity against any person, (even an infant, or a married woman,) who

power, equity will interpose and supply the defect in favor of parties for whom the person entrusted with the execution of the power is under a moral or legal obligation to provide by an execution of the power. Such a defective execution will be aided in favor of persons standing upon a valuable or a meritorious consideration; such as a *bona fide* purchaser for a valuable consideration, a creditor, a wife, and a legitimate child; unless such aid of the defective execution, would, under all the circumstances, be inequitable to other persons; or it is repelled by some counter equity. In cases of defective execution of powers, a distinction is made between powers which are created by private parties, and those which are specially created by statute; the latter being construed strictly. The defects which may be remedied are those which are not of the very substance of the power. Hence the want of a seal, or of witnesses or of a signature, and defects in the limitations of the property, estate, or interest, will be aided. But equity will not afford its aid if the power be executed without the consent of parties who are required to consent to it. So if it be required to be executed by *will*, and it is executed by an irrevocable and absolute deed; this being apparently contrary to the settler's intention. For a will is always revocable during the life of the testator; while a deed would not be revocable unless expressly so stated in it. So also relief has been denied where a party having a power of appointment executed it absolutely, without introducing a power of revocation, upon a mistake of law, that being a voluntary deed, it was revocable. On the other hand, where powers in the nature of trusts are required to be executed by trustee in favor of particular persons, and they fail of being so executed, by casualty or accident, equity will interpose and grant suitable relief. 1 Story's Eq. Juris. sec. 95 *et seq.*; 2 Chance on Powers, ch. 23, art. 2818 to 3024; Sug. on Powers, ch. 6, p. 344 to 393, 3d ed.; Powell on Powers, p. 54, 155, 243, 280.

"What shall constitute an execution, or preparatory steps, or attempts, towards the execution of a power" says Story (1 Story's Eq. Juris. sec. 171, *et seq.*) "entitling the party to relief in equity, on the ground of a defective execution, has been largely and liberally interpreted. It is clear, that it is not sufficient that there should be a mere floating and indefinite intention to execute the power, without some steps taken to give it legal effect. Some steps must be taken or some acts done, with this sole and definite intention, and be such as are properly referrible to the power. Lord Mansfield, at one time contended that whatever is an equitable ought to be deemed a legal execution of a power, because there should be a uniform rule of property; and that if courts of equity would presume that a strict adherence to the precise form pointed out in the creation of the power, was not intended, and therefore not necessary, the same rule should prevail at law. But this doctrine has been overruled. And indeed courts of equity do not deem the power well executed unless the form is adhered to; but in cases of a meritorious consideration, they supply the defect. And relief will be granted, not only when the defect arises from an informal instrument, not within the scope of the power; but also when the

having a prior interest in the property, encourages, or permits him, to complete his purchase in ignorance of its

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cern, &c.,  
who en-  
courage  
purchase of.

defect arises from the improper execution of the appropriate instrument. All that is necessary is, that the intention to execute the power should clearly appear in writing. Thus, if the donee of a power, merely covenant to execute it; or by his will, desire the remainder man to create the estate; or enter into a contract, not under seal, to execute the power; or, by letters, promise to grant an estate, which he can execute only by the instrumentality of the power; in all these, and the like cases, equity will supply the defect. And even an answer to a bill in equity stating that the party does appoint, and intends, by a writing in due form, to appoint the fund, will be an execution of the power for this purpose. The like rule prevails, where the instrument selected is not that prescribed by the power; provided it is not, in its own nature repugnant to the true object of the creation of the power. Thus, if the power ought to be executed by a deed, but it is executed by a will, the defective execution will be aided. But if the power ought to be executed by a will and the donee of the power should execute a conveyance of the estate by an absolute deed, it will be invalid; because such a conveyance, if it avail to any purpose, must avail to the immediate destruction of the power, since it would no longer be revocable as a will would be. The intention of the power in its creation, was to reserve an entire control over its execution, until the moment of the death of the donee; and this intention would be defeated by any other instrument than a will. An act done, not strictly according to the terms of the power, but consistent with its intent, may be upheld in equity. But an act which violates the very purpose for which the power was created, and the very control over it, which it meant to vest in the donee, is repugnant to it, and cannot be deemed, in any just sense, to be an execution of it. But, in other respects, there is no difference between a defective execution of a power by a will, and by a deed; for in each case, the remedial interposition of equity will be applied. Thus, if a power is required to be executed in the presence of three witnesses, and it is executed in the presence of two only, equity will interfere in such a case. So if the instrument, whether it be a deed, or a will, is required to be signed and sealed, and it is without seal or signature, equity will relieve. And where a power is required to be executed by a will, by way of appointment, there, the appointment will be aided, although the will is not duly executed according to the statute of frauds; for it takes effect, not under the will, but under the instrument creating the power. Equity will also, in many cases, grant relief, where, by mistake, a different kind of estate or interest is given from that which is authorized by the power, or where there is an excess of the power. In all these cases, it is to be understood, that the intention and objects of the power, are not defeated, or put aside; but that they are only attempted by the party, to be carried formally into effect. But in all these cases of relief by aiding and correcting defects or mistakes in the execution of instruments and powers, the party asking relief, must stand upon some equity superior to that of the party against whom he asks it. If the equities are equal, a court of equity is silent and passive. Thus equity will not relieve one person

Chap. XV. existence :[1](f) and a party guilty of misrepresentation \*will probably be bound by it, although he make it in ignorance or mistake, if he might have known the truth ;(g)[2] but a mortgagee, it appears, need not answer

(f) See *Watts v. Cresswell*, 2 Eq. Ca. Abr. 515; *Savage v. Foster*, 9 Mod. 35; *Ibbotson v. Rhodes*, 2 Vern. 554; *Draper v. Borlace*, *ib.* 370; *Berrisford v. Milward*, 2 Atk. 49; *Govett v. Richmond*, 7 Sim. 1; *Clare v. Earl of Bedford*, 13 Vin. Abr. 536; *Boyd v. Belton*, 1 J. & L. 730; *Thompson v. Simpson*, 2 J. & J. 110; *Overton v. Banister*, 3 Hare, 503; *Nicholson v. Hooper*, 4 Myl. & Cr. 179; see further as to infants, *Stikeman v. Dawson*, 1 De G. & S. 90; *Esron v. Nicholas*, *ib.* 118, *supra*; *Wright v. Snowe*, 2 De G. & S. 321.

(g) See *Pearson v. Morgan*, 2 Bro. C. C. 388; but see Sug. 1022, n.

claiming under a voluntary defective conveyance, against another claiming also, under a voluntary conveyance; but will leave the parties to their rights at law. For regularly, equity is remediable to those only, who come in upon an actual consideration; and therefore there should be some consideration equitable or otherwise, express, or implied. But there are excepted cases, even from this rule; for a defective execution has been aided in favor of a volunteer where a strict compliance with the power has been impossible, from circumstances beyond the control of the party; as where the prescribed witnesses could not be found; or where an interested party, having possession of the deed creating the power, has kept it from the sight of the party executing the power, so that he could not ascertain the formalities required. For the same reason, equity will not supply a surrender, or aid the defective execution of a power, to the disinheritance of the heir at law. Neither will it supply such a surrender in favor of creditors, where there are, otherwise, assets sufficient to pay their debts; nor against a purchaser, for a valuable consideration, without notice. And there are other cases of the defective execution of powers, where equity will not interpose; as for instance, in regard to powers which are, in their own nature, statutable, where equity must follow the land, be the consideration ever so meritorious. And indeed, it may be stated as generally, although not universally true, that the remedial power of courts of equity, does not extend to the supplying of any circumstance, for the want of which, the legislature has declared the instrument void; for otherwise, equity would, in effect, defeat the very policy of the legislative enactments."

[1] If A. sells or conveys his lands, or slaves to B. and then produces to another, his previous title, and obtains credit on the goods or lands, by pledging them for money loaned, he is guilty of fraud; and if the true owner stands by, and does not make his title known, he will be bound to make good the contract; on the principle that he who holds his peace when he ought to have spoken, shall not be heard now that he should be silent. He is deemed, in equity a party to the fraud. *Bank of U. S. v. Lee*, 13 Peter's Rep. 107.

[2] So where a person intending to buy an estate inquiries of another whether he has any incumbrance on the estate, and states his intention



an inquiry as to the extent of his claims unless the intended purchaser be entitled and offer to redeem him ;(h) nor need he voluntarily communicate his claim to a person whom he knows to be about to purchase ;(i) unless he have reason to believe that a fraud is contemplated by the vendor.(k)

The purchaser will also be protected in equity against any person who, knowing his own title, encourages, or fraudulently permits the former, in ignorance of it, to lay out money in improving the property ;(l) but, when a party has once given a distinct notice of his claim, and the purchaser subsequently lays out money, it lies on him to show that the other has abandoned, or given reason to believe that he has abandoned his claim ;(m) nor need the notice disclose the particulars of the claimant's title ; nor, if the claim exceed what he is entitled to, is the party in possession therefore justified in disregarding it.(n)

And it appears that the mere fact of a purchaser or mortgagee allowing the vendor to retain the title deeds, will not, in the absence of other circumstances indicative of fraud, affect his title as against subsequent purchasers or incumbrancers :(o) even the fact of a mortgagee having returned the deeds to the mortgagor, will not, in itself, \*have this effect :(p) and the same would, it is conceived,

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or subsequent expenditure on the property.

More omission to take deeds does not affect purchaser's title as against subsequent incumbrancers.

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(h) *Supra*, 228.

(i) *Osborn v. Lea*, 9 Mod. 97.

(k) *Vide supra*, p. 228.

(l) See *Kenney v. Browne*, 3 Ridg. P. C. 518 ; *East India Company v. Vincent*, 2 Atk. 83 ; and see *Williams v. Earl of Jersey*, Cr. & Ph. 91, and *Powell v. Thomas*, 6 Hare, 300.

(m) See *Clare Hall v. Harding*, 6 Hare, see 297.

(n) *S. C.* *Id.* 273.

(o) See *Evans v. Bicknell*, 6 Ves. 174 ; *Harper v. Faulder*, 4 Madd. 129 ; *Martinez v. Cooper*, 2 Russ. 198 ; *Stevens v. Stevens*, 2 Coll. 20 ; *Allen v. Knight*, 5 Ha. 272 ; affirmed 11 Jur. 527 ; *Farrow v. Rees*, 4 Beav. 21.

(p) See *Martinez v. Cooper*, and *Stevens v. Stevens*, *ubi supra*.

to buy it, if the person of whom the inquiry is made, deny the fact, equity will relieve the purchaser against the incumbrance. Again where a purchaser of an equitable right inquires of the trustee of the legal estate, whether he knows of any incumbrance, and he answers in the negative, if it turn out that he had notice of any charge, he will be answerable to the purchaser, although he pleads forgetfulness in excuse.

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hold good in the case of a purchaser, if a plausible reason were given for his assenting to what would, *prima facie*, be an unreasonable and suspicious request: in fact, mere indiscretion seems insufficient to postpone a purchaser; there must, for that purpose, be an intent to facilitate a fraud, or a wilful indifference to a fraud which there was good reason to suspect was about to be committed.

Assignees of insolvent, not asserting their rights for nineteen years, yet not postponed in equity.

It has been even held, that the omission of the assignees of an insolvent for nineteen years to sell or take possession of his copyhold property, or of the copies of court roll, or to enter their title upon the court rolls, whereby the insolvent is enabled to retain the property as if owner, and mortgage it for value to a person without notice of the insolvency, is no sufficient ground for giving the mortgagee a charge in priority to the title of the assignees.(q)

Purchaser how far protected against vendor's assignees in bankruptcy and insolvency.

By the 12 and 13 Vict. c. 106,(r) all payments really and *bona fide* made to or by a bankrupt, and conveyances executed by him before the date of the fiat, or the filing of a petition for adjudication, and all contracts, dealings, and transactions, by and with him really and *bona fide* made and entered into before the date of the fiat or the filing of such petition, are protected, if the other party has no notice of a prior act of bankruptcy:(s) the same act(t) also provides,(u) that no person shall be liable to become bankrupt by reason of any act of bankruptcy committed more than twelve months before the issuing of the fiat, or filing of the petition for adjudication; and also that no \*purchase from any bankrupt, *bona fide*, and for valuable consideration, where the purchaser had notice of a prior act of bankruptcy, shall be impeached by reason thereof, unless a fiat or petition for adjudication shall have been sued out or filed within twelve months after such act of bankruptcy: and the gazette is made conclusive

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(q) *Cole v. Coles*, 6 Ha. 517; affirmed on appeal, see p. 524.

(r) See sect. 133; and see 6 Geo. IV. c. 16, sect. 82.

(s) The validity of such payment, if made before the late act came into operation, seems to depend upon the provisions of the 6 Geo. IV. c. 16; see *Turquand v. Vanderplank*, 10 M. & W. 180, 194; Sug. 952.

(t) Which repeals the 2 and 3 Vict. c. 29, and so much of the 2 and 3 Vict. c. 11, as relate to bankruptcy; see schedule A.

(u) Sects. 88 and 134.

evidence of the bankruptcy, unless the bankrupt proceed to dispute the fiat or petition for adjudication within twenty-one days after the advertisement of the bankruptcy appears in the gazette, (if he was within the United Kingdom at the date of the adjudication;) or within three months, (if he was then in any other part of Europe;) or within twelve months, (if he was then in any other part of the world:)(*w*) and no title to any real or personal property sold under any bankruptcy is to be impeached by the bankrupt, or any person claiming under him, in respect of any defect in the fiat or petition for adjudication, or in any of the proceedings under the same, unless the bankrupt shall, within the time allowed by the act, have commenced proceedings to dispute, dismiss, or annul the fiat, petition, or adjudication, and duly prosecuted the same:(*x*) and the act contains provisions, protecting, in the event of a fiat, petition, or adjudication, being superseded, annulled, or dismissed, any person who may *bona fide*, whether under compulsion or otherwise, and without notice of the institution of proceedings to dispute or annul such fiat, petition, or adjudication, have paid to the assignees any money due to the bankrupt's estate:(*y*) and if, before the time has elapsed within which the bankrupt may dispute the bankruptcy, his assignees commence any action or suit for any money due to his estate, the debtor is authorized to pay the money into court, which payment is to be valid as against the bankrupt:(*z*) and where a conveyance of the bankrupt's property would require to be registered, the certificate of appointment of assignees is to be registered: and if not so registered within (as regards Great Britain and Ireland,) two months from the appointment, the same is not to affect the title of a purchaser for valuable consideration, without notice, claim-

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(*w*) Sect. 233.

(*x*) Sect. 131. It was held in *Gould v. Shoyer*, 6 Bing. 738, that a similar provision in the 6 Geo. IV. c. 16 (see s. 87,) did not protect a purchaser, under a commission which is afterwards superseded, from the claim of the assignees under a subsequent commission.

(*y*) Sect. 155.

(*z*) Sect. 158; and see 5 and 6 Vict. c. 122, ss. 24 and 25.

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ing under a deed registered prior to the registration of such appointment : (a) and other acts (b) contain similar provisions for the registration of the certificates of appointment of assignees of insolvents.

A conveyance to a creditor for a valuable consideration sufficiently strong in itself to influence the debtor to make it, is not "voluntary" within the meaning of the Insolvent Acts, although the consideration consists in part of a pre-existing debt. (c)

or against his  
judgment  
creditors,

We have already taken a general view of the law relating to judgments, and have adverted to the 2 and 3 Vict. c. 11, which preserves to *bona fide* purchasers without notice, (d) all those means of defence which were available before the passing of the 1 and 2 Vict. c. 110; and to the 3 and 4 Vict. c. 82, which, in effect, provides that notice (d) of an unregistered judgment shall not subject a purchaser to the extended remedies given to a creditor by the 1 and 2 Vict. c. 110. It may be further remarked, that an equitable incumbrancer or purchaser will, in equity, be protected against a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and \*possession of the land under an *elegit* without notice of the mortgage or purchase : (e) but, as we have seen, the purchaser, after notice of the subsequent judgment, could not, without the consent of the creditor, safely pay to the vendor any part of the purchase-money which happened to remain unpaid.

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or against de-  
fects in fines  
or recoveries

The 14 Geo. II. c. 20, and the 3 and 4 Will. IV. c. 74, (f) contain provisions for giving, in certain specified cases, validity to defective fines and recoveries, either generally, or as in favor of purchasers; and the 5 Vict. c. 32, (g) contains provisions for giving, in certain specified cases,

(a) Sect. 143; see 1 and 2 Will. IV. c. 56, s. 27.

(b) 1 and 2 Vict. c. 110, s. 46; 5 and 6 Vict. c. 116, s. 8.

(c) *Margereson v. Saxton*, 1 Y. & C. Ex. 525; see *Stuckey v. Drewe*, 2 M. & K. 190.

(d) *Quære*, whether Palatinate judgments are within the act; *supra*, p. 240.

(e) See *Whitworth v. Gaugain*, 1 Ph. 728, and cases there cited.

(f) See sects. from 4 to 12.

(g) See sects. 2 and 3; *Doe v. Price*, 16 M. & W. 603.

validity to fines and recoveries levied and suffered in the now abolished courts of Great Session in Wales; and of Session in Cheshire: and the 11 and 12 Vict. c. 70, supplies the want of proclamations, as respects fines levied at Westminster.<sup>(h)</sup> And the 54 Geo. III. c. 173,<sup>(i)</sup> and the 57 Geo. III. c. 100,<sup>(k)</sup> contain provisions for confirming, in certain specified cases, defective titles to land tax. And by the 2 Vict. c. 11, purchasers are protected against future obligations to the crown, and against any *lis pendens*, unless the same respectively are registered as directed by the act.

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or in sales of  
land tax,or against *lis  
pendens*,

(4.) *As to priority under the Registration Acts.*[1]

The existing registry acts purport to render any deed, affecting either the legal or equitable estate, void as

or against un-  
registered de-  
fects in regis-  
ter counties,

(h) Sect. 1; see sect. 3.

(i) See sect. 12.

(k) See sects. from 22 to 26; *Doe v. Phillips*, 4 Per. & Dav. 562; and see as to sales by rector for redemption of land-tax, *Doe v. Woodward*, 1 Exch. R. 273.

[1] A deed is registered, in contemplation of law, when it is entitled to registration, and is deposited with the register in his office for that purpose. Deeds not recorded are valid between the parties and their heirs, and available to the grantee, at least, by way of estoppel; and are good against all others, except creditors, and subsequent *bona fide* purchasers, without notice.

In Pennsylvania and Ohio, the time within which deeds are required, by law, to be registered, is six months; in Delaware, it is one year; in Virginia, it is eight months; in North Carolina, it is two years; in South Carolina, it is six months, if the grantor was resident in the state at the time of the execution of the deed; twelve months, if he resided in any other of the United States, and two years if in a foreign country. In Indiana, it is ninety days. In Mississippi and Alabama, it is three months. In Kentucky, it is eight months, unless the grantor be a resident of any other of the United States, when it is eighteen months. In Delaware, Virginia, Ohio, and Mississippi, mortgages become a lien only from the time of their registration. In Kentucky and Pennsylvania, mortgages must be recorded in sixty days, and in North Carolina, in six months after their execution. In Pennsylvania, mortgages not recorded within the time specified, take effect only from the time of their registration. In New Hampshire and Vermont, where the grantor refuses to acknowledge the deed, or is dead, or out of the state, so that it must be authenticated in some other manner, by proof, by the subscribing witnesses, or by the testimony of others, the deed may be provisionally registered, which shall avail, to all intents, as a regular registration, for the space of sixty days;

Chap. XV. against a purchaser or mortgagee claiming under an instrument of an earlier date of registration : at law, notwithstanding notice, mere priority of registration absolutely determines the right to the property as between parties claiming under \*adverse registered instruments purporting

prior registration conclusive at law but not in equity.  
[\*400]

and in Vermont, for the further space of six days after the termination of any legal proceedings which may then be pending, for proving the execution of the deed. In Massachusetts, a copy filed is made available instead of registration, as a sufficient caution, for thirty days from the time of filing, and until seven days after the termination of any proceedings then pending, for proof or acknowledgment of the deed. In Rhode Island, if the grantor refuse to acknowledge the deed, he may be committed to prison, by a magistrate, with the right of appeal to the Supreme Judicial Court; in which case, a copy of the deed filed in the registry is available during the pendency of the appeal. In Connecticut, in such a case, the filing of a copy of the deed is made to serve "until the trial has been had." In Indiana, if the deed is not acknowledged, the filing of a copy is a sufficient caution for thirty days, if the original deed is proved and filed within that period. In Michigan, if the deed is not acknowledged, a copy filed in the registry is a sufficient registration for thirty days, if proceedings for proof of the deed are taken before a justice of the peace, and for seven days after the termination of such proceedings; and for ten days after the first day of the term, if the proceedings are had in a court of record. Mass. Rev. Stat. ch. 59, s. 19, 20; Verm. Rev. St. ch. 16, 17; Conn. Rev. St. tit. 29, ch. 1, s. 12; N. Hamp. Rev. Stat. ch. 130, s. 7; Maine Rev. Stat. ch. 91, s. 20; R. Island Rev. Stat. p. 258, s. 4; Mich. Rev. St. ch. 65, ss. 21, 22; Ind. Rev. St. ch. 28, ss. 25, 26, 34; Dunlop's Laws of Penn. ch. 61, pp. 116, 117, 354; Rev. St. of Del. pp. 90, 91; *Tates' Virg. Dig.* p. 173; N. C. Rev. St. pp. 224, 231; S. C. St. at Large, vol. 7, p. 233; Ohio Rev. St. ch. 37, s. 8; Ken. Rev. St. vol. 1, pp. 432, 433, 438, 448, 452; Miss. Rev. St. ch. 34, s. 5; *Toulm. Ala. Dig.* pp. 245, 246; 4 Kent Comm, 457, 459.

No paper which is not a deed, and does not convey the land from the grantor to the grantee, is within the New York registry statute. 20 John. Rep. 663; 1 John. Ch. Rep. 288. The recording of a deed which is not executed according to the requisites of a statute, does not amount to constructive notice of its existence to third persons. *Carter v. Champion*, 8 Conn. Rep. 548. A deed recorded without an acknowledgment, before a magistrate, has been held to be a record of no effect. In *Blood v. Blood*, 23 Pick. Rep. 60, the lease was substantially one for a term of more than seven years, executed by a party before his marriage, but never acknowledged and recorded, and the lessee survived him. Held, that the widow was not entitled to dower in the land; for, the unrecorded lease was good and effectual as against the grantor, and by the force and effect of it he parted with his legal seisin, so that, at no period of time after the inter-marriage was he, in any manner, seised of the land.

The certificate of the registering officer cannot be impeached or controlled by producing the record, and showing a variance. *Ames v. Phelps*, 18 Pick. Rep. 314.

to pass the legal estate :<sup>(l)</sup> but, in equity, registration is Chap. XV.  
no protection against an unregistered assurance of which the party claiming under the registered instrument had notice prior to the completion of his purchase or security :<sup>(m)</sup>[1] nor does registration of an equitable incum-

(l) *Doe v. Allsop*, 5 B. & Al. 142.

(m) *Cheval v. Nichols*, Stra. 664; *Le Neve v. Le Neve*, 3 Atk. 646; see p. 651; *Tunstall v. Trappes*, *Gosling's case*, 3 Sim. 301; and see *Davis v. Earl of Strathmore*, 16 Ves. 419. The present registration commissioners recommend (see 1st Report) that priority of registration shall always give priority of title to a person claiming for valuable consideration under an assurance obtained without fraud; notwithstanding he may have notice of the prior unregistered instrument: the great difficulty seems to be, to distinguish between actual notice and actual fraud.

[1] This is consistent with the general principles of equity. The intention is to secure subsequent purchasers and mortgagees against *prior secret conveyances and fraudulent incumbrances*; and therefore, where a person has notice of a prior conveyance, it is not a secret conveyance, by which he can be prejudiced; for he can be in no danger where he knows of another incumbrance; because, then, he might have stopped. It may therefore be stated generally, that a person who takes a conveyance of land, with the knowledge that the grantor had previously conveyed it to another, cannot hold it against the first purchaser, even though the first conveyance is not recorded. It would be fraudulent in him to attempt thus to deprive the purchaser of the fruits of his contract. If the grantor can be considered as having any title or estate after the first conveyance, it is merely the legal estate, which he holds in trust for the first purchaser; and the second, purchasing with knowledge of the trust, holds subject to the same trust. But, if the second purchaser procures his deed to be recorded before the other, and then sells the land *bona fide*, and for a valuable consideration, to a person wholly ignorant of those circumstances, the latter will hold the land against the first purchaser. If this were not so, our laws which require the registering of deeds would be useless: because a purchaser, after the most thorough examination in the registry of deeds, and finding a succession of conveyances, all in legal form, and in perfect order, might still be evicted, upon proof of a secret trust, or a fraud on the part of some former owner. See *Norcross v. Widgery*, 2 Mass. Rep. 506; *State of Connecticut v. Bradish*, 14 Mass. Rep. 296; *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. Rep. 603, 607; *Jackson v. Burgott*, 10 Johns. Rep. 457, 460; *Jackson v. Sharp*, 9 Johns. Rep. 162, 168; *Lambert v. Nancy*, 2 Munf. 196; *Blair v. Oweles*, 1 Munf. 38; *Hoover v. Donnelly*, 3 Hen. & Munf. 316; *Roberts v. Staunton*, 2 Munf. 129, 135; *Farnsworth v. Childs*, 4 Mass. Rep. 637, 639; *Marshall v. Fisk*, 6 Mass. Rep. 24; *Stroud v. Lockhart*, 4 Dall. 153; *Dey v. Dunham*, 2 John. Ch. Rep. 182; *S. C.*, on appeal, 15 Johns. Rep. 555; 2 Binn. Rep. 497.

Where R. S., sen., in 1821, conveyed the demanded premises to R. S., jun., taking back, at the same time, a mortgage of the premises to secure

Chap. XV. brance prevent the person who then has, or subsequently acquires, the legal estate, from using it for the protection of any equitable interest which he may acquire in the property without notice of the registered incumbrance:(n) and a purchaser advancing his money and taking a conveyance without notice of a prior deed which has been imperfectly registered, may, upon acquiring notice of it, register his own deed, and so gain priority.(o)

Purchaser's  
title how im-  
pachable  
under regis-  
ter acts.

With the probable exception of a purchaser claiming under a devisee where the will has not been registered within the period prescribed by the acts—in which case it seems doubtful whether a registered conveyance for value by the heir will not displace the registered title of the purchaser from the devisee;(p) subject, of course, to the equitable doctrine of notice,—it may be laid down as a general rule, that a purchaser can be evicted under the registration acts, only by a person claiming under an instrument executed by the party under whom the two adverse titles are derived or parties taking under him by \*act in law, and registered prior to the registration of the

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(n) See *Morecock v. Dickins*, Amb. 678; *Bedford v. Bacchus*, ib., 680, cited; *Wrightson v. Hudson*, 2 Eq. Ca. Abr. 609.

(o) *Essex v. Baugh*, 1 Y. & C. C. C. 620.

(p) See an article, 14 Jur. pt. 2, p. 267.

the purchase-money; and R. S., jun., in August, 1828, conveyed the premises to the demandant, whose deed was recorded: but, prior to this latter deed, R. S., sen., had given a mortgage to the tenant, whose deed was not recorded until after that to the demandant. After the conveyances, the tenant and R. S., sen., conveyed the premises to S. S.: held, that this last conveyance was no extinguishment of the mortgage from R. S., jun.; and, if the conveyance did operate to extinguish that mortgage, it was immaterial; for, if so, then the legal estate passed to S. S. from the other grantor; and, after this conveyance, S. S. conveyed to the tenant; and, by this conveyance, the legal estate passed to him. *Sherman v. Abbott*, 18 Pick. Rep. 448.

Evidence that the tenant cut wood on the land, is proper to prove constructive notice to the demandant that the former held a deed of the land; but it is very slight evidence, and has little tendency to give notice to strangers, that the person thus cutting wood holds a deed of such land, which deed is not on record; and such evidence is still more slight where the party thus cutting wood is the owner of an undivided moiety of the land, that he holds an unregistered deed of the other moiety from his cotenant. *Kendall v. Lawrence*, 22 Pick. Rep. 540.



document which forms the root of the purchaser's adverse title; for instance, if A. convey first to B., who does not register, and then to C., who does not register, and then C. convey to D., who registers, D. acquires no title against B. unless he can procure a conveyance from A. to C. to be duly registered;(q) which would, it is conceived, be impracticable if A. and the witnesses attesting his execution of his original conveyance to C. were dead;(r) so, where a lease is unregistered, no statutory title is acquired against the owner of the reversion by registering an assignment of the lease;(s)[1] but if A., (a woman,) after conveying to B., marry, and her husband convey the estate which he takes *in jure mariti* to C., who registers before B.'s conveyance is registered, C. thereby acquires priority, (as intimated by the terms of the above proposition:)(t) and the same rule would, it appears, prevail if A., after conveying to B., were to die intestate, and her heir at law were to convey to C., who were to register before any registration by B.(u)

(q) *Jack v. Armstrong*, 1 Hud. & Bro. 727.

(r) *S. C.*, and *Essex v. Baugh*, 1 Y. & C. C. C. 620; *vide supra*, 319, 320, as to the necessity for the memorial being attested by a witness to the execution of the deed by the grantor.

(s) *Honeycomb v. Waldron*, 2 Stra. 1064; and see *Battersby v. Rockfort*, 2 J. & L. 431.

(t) See *Warburton v. Loveland*, 2 Dow. & C. 480.

(u) See *S. C.*

[1] A., possessed of a term of years, assigned it to B. by an unregistered deed. Afterwards the sheriff, under writs of *fi. fa.* against A., sold the term to C.; and the assignment from the sheriff to C. was registered, but it was held that the unregistered assignment from A. to B. should prevail over the registered assignment to C. *Fury v. Smith*, 1 Huds. & Bro. 735.

Where A., for a valuable consideration, conveyed land to B., and before B.'s deed was registered, A. fraudulently conveyed the same land to C., who knew of the prior conveyance, and immediately put his deed on record, before B., and then conveyed to D., who was ignorant of the fraud; held, that the title of D. would be valid; and if D. conveyed to E., who had knowledge of the fraud, E.'s title could be good. *Trull v. Bigelow*, 16 Mass. Rep. 406.

If a mortgagee of land take with notice of an unregistered deed, and assign the mortgage to one ignorant of a prior deed, such assignee will be entitled to hold the mortgage as security for his whole demand, as against the first grantee of the land. *Glidden v. Hunt*, 24 Pick. Rep. 221.

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So, if A. convey to B., who does not register, and then B. convey to D., who registers merely his own conveyance, and then A. convey to C., who registers, D., it is conceived, has no title as against C. and parties claiming under him; for, the registered conveyance to C. displaces B.'s title under his unregistered conveyance; and this being gone, the conveyance to D. goes with it: and in such a case, a person searching the register would have no reason to suppose that the property conveyed by B. to D. \*had ever been held by A.; nor, as respects parties claiming under C., would it make any difference that the assurances by C. were unregistered.(w)

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Priorities  
under fines  
and recoveries  
abolition  
act.

We have already referred to the provisions in the 3 and 4 Will. IV. c. 74, as to the priorities of parties claiming under disentailing assurances, both of freeholds and copyholds.(x)

(5.) *As to notice—what it is—how it may be proved—and its effect—of void or voidable estates and voluntary or fraudulent conveyances—equitable relief against purchaser with notice.*

Purchaser  
only affected  
by actual no-  
tice of unre-  
gistered as-  
surance or  
judgment.

Notice of an unregistered security must, in order to affect a purchaser claiming under a registered instrument, be actual notice affecting him with fraud :(y) so, also, notice of an unregistered judgment must, it would seem, be actual in order to affect a purchaser :(z) and actual notice to the solicitor or agent in the transaction is actual notice to the client or principal :(a) and where the principal is affected with personal knowledge, it is, of course, immaterial whether he acquired it in one or another character.(b)[1]

Notice to so-  
licitor is no-  
tice to client.

(w) See S. C.

(x) *Vide supra*, p. 321, *et seq.*

(y) See *Jolland v. Stainbridge*, 3 Ves. 478; *Wyatt v. Barwell*, 19 Ves. 435; *Buckley v. Lanauze*, Ll. & G. Rep. t. pl. 327, 341.

(z) See *Tunstall v. Trappes*, *Gosling's case*, 3 Sim. 301.

(a) S. C., and *Le Neve v. Le Neve*, 3 Atk. 646; and see *Davis v. Earl of Strathmore*, 16 Ves. 419; *Sheldon v. Cox*, 2 Eden, 224.

(b) See *Meuz v. Bell*, 1 Ha. 88.

[1] "In countries where the registration of conveyances is required,"

Actual notice, according to Sir E. Sugden,<sup>(c)</sup> "must be given by a party interested in the property,<sup>(d)</sup> and in the

Chap. XV.  
Actual notice  
when, by

(c) Sug. 1040; and see 1 J. & L. 442.

(d) See *Wildgoose v. Wayland*, Goulds. 147.

says Story, (1 Story's Eq. Juris. s. 397, *et seq.*) "in order to make them perfect titles against subsequent purchasers, if a subsequent purchaser has notice, at the time of his purchase, of any prior unregistered conveyance, he shall not be permitted to avail himself of his title against that prior conveyance. This has been long the settled doctrine in courts of equity; and, it is often applied in this country, though not in England, in courts of law, as a just exposition of the registry acts. The object of all acts of this sort is to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances. But where such purchasers and mortgagees have notice of any prior conveyance, it is impossible to hold that it is a secret conveyance by which they are prejudiced. The doctrine as to postponing registered to unregistered conveyances, upon the ground of notice, has broken in upon the policy of the registration acts; for, a registered conveyance stands upon a different footing from an ordinary conveyance. It has been doubted whether courts ought ever to have suffered the question of notice to be agitated, as against a party who has duly registered his conveyance. But they have said that fraud shall not be permitted to prevail. There is, however, this qualification upon the doctrine, that it shall be available only in cases where the notice is so clearly proved, as to make it fraudulent in the purchaser to take and register a conveyance, in prejudice to the known title of the other party. What shall constitute notice, in cases of subsequent purchasers, is a point of some nicety, and resolves itself, sometimes into matter of fact, and sometimes into matter of law. Notice may be either actual and positive, or it may be implied and constructive. Actual notice requires no definition; for, in that case, knowledge of the fact is brought directly home to the party. Constructive notice is, in its nature, no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted. How far the registration of a conveyance, in countries where such registration is authorized and required by law, shall operate as constructive notice to subsequent purchasers by mere presumption of law, independent of any actual notice, has been much discussed, both in England and in this country. It is not doubted, in either country, that a prior conveyance, duly registered, operates to give full effect to the legal and equitable estate conveyed thereby, against subsequent conveyances of the same legal and equitable estate. But the question becomes important as to other collateral effects, such as defeating the right of tacking of mortgages, and other incidentally accruing equities between the different purchasers. For, if the mere registry, in such cases, without actual knowledge of the conveyance, operates as constructive notice, it shuts out many of those equities which otherwise might have an obligatory priority. In England, the doctrine seems at length to be settled, that the mere registration of a conveyance shall not be deemed

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course of the treaty for the purchase:" and he also cites a remark made by the Master of the Rolls, in *Jolland v.*

whom, and  
how to be given.

constructive notice to subsequent purchasers; but, that actual notice must be brought home to the party, amounting to fraud. In America, however, it is uniformly held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property. But it is not to be understood of all deeds and conveyances, which may be *de facto* registered; but, of such only as are authorized and required by law to be registered, and are duly registered in compliance with law. If they are not authorized or required to be registered, or the registry itself is not in compliance with the law, the act of registration is treated as a mere nullity; and then the subsequent purchaser is affected only by such actual notice as would amount to a fraud." See 4 Kent Com. 178, 180; *Johnson v. Slagg*, 2 Johns. Rep. 510; *Evans v. Jones*, 1 Yeates, 173; *Shultz v. Moore*, 1 McLean, 520; *Tilton v. Hunter*, 11 Shepl. 29; *Bates v. Norcross*, 14 Pick. Rep. 224; *Heister v. Fortner*, 2 Binn. Rep. 40; *Frost v. Beckman*, 1 John. Ch. Rep. 300; *Parkhurst v. Alexander*, 1 Johns. Ch. Rep. 394; *McMechan v. Griffing*, 3 Pick. 149; *Jackson v. Sharp*, 9 Johns. 163; *Cortiss v. Cortiss*, 8 Verm. Rep. 373; *Rogers v. Jones*, 8 N. H. Rep. 264; *Porter v. Cole*, 4 Greenl. 20; *Beers v. Hawley*, 2 Conn. Rep. 469; *Garwood v. Garwood*, 4 Halst. Rep. 193; *Stroud v. Lockhart*, 4 Dall. 153. To ascertain which of several deeds executed on the same day, takes precedence, the court will inquire into the fractional parts of a day. *Lemon v. Staats*, 1 Cow. Rep. 592. If the deed is made by two, but is acknowledged by one only, it is held to be only presumptive notice, and not conclusive on subsequent purchasers. *Shaw v. Poor*, 6 Pick. Rep. 86. This rule applies also to subsequent attachments of the land, under process of law. *Priest v. Rice*, 1 Pick. 164; *Dixon v. Doe*, 1 Smed. & Marsh. 70. The notice must be of a deed actually made; knowledge of an intended conveyance, or of a treaty of purchase, even though the deed of conveyance is in making, is insufficient. *Warden v. Adams*, 15 Mass. Rep. 233; *Cushing v. Hurd*, 4 Pick. 252. The open, and visible possession and improvement of land by a grantee whose deed is not registered, is presumptive evidence of notice to all persons of the existence and extent of his title or claim; but, it is not equivalent to the registration of his deed; for registration is, in itself, constructive and conclusive notice, not to be controverted, except where actual guilt is charged *criminally*. But possession, though generally satisfactory evidence of notice, may be rebutted by counter proof: as where a lessee already in possession receives a deed of conveyance in fee, which is not registered; or, where one tenant in common, in actual possession and pendency of profits, receives a deed from his co-tenant, who has never occupied the land. See 2 Powell on Mortgages, ch. 14, p. 561; 4 Kent Com. 179; *Heves v. Wiswell*, 8 Greenl. Rep. 94; *McMechan v. Griffing*, 3 Pick. 149; *Mathews v. Demeritt*, 9 Shepl. 312; *Scott v. Gallaher*, 14 Serg. & Rawle, 333. If a party claims by two titles, and places but one of them on the registry, his possession, if it is consistent with the recorded title, is not notice of the other. *Plummer v. Robertson*, 6 Serg. & Rawle, 179; *Woods v. Farmer*, 7 Serg. & Rawle, 382. The registration of a deed defectively executed, is

*Stainbridge*, (e) intimating a doubt whether a general notice of title is sufficient, and whether it is not neces- Chap. XV.

(e) 3 Ves.; see p. 486.

not notice. *Troop v. Haight*, 1 Hopk. 61; *Frost v. Beekman*, 1 Johns. Ch. Rep. 300; *Carter v. Champion*, 8 Conn. Rep. 549. Notice to the attaching officer, or to the debtor, is not deemed notice to the creditor, even though it be communicated to him after the attachment, and before the land is taken in execution; for, his title commenced by the attachment, and they were not his agents. *Stanley v. Perley*, 5 Greenl. Rep. 369; *Coffin v. Ray*, 1 Met. Rep. 212. Whatever is sufficient to put a person on inquiry is considered, in equity, as conveying notice. *Sigourney v. Munn*, 7 Conn. Rep. 324; *Booth v. Barnum*, 9 Conn. Rep. 286; *Peters v. Goodrich*, 3 Conn. Rep. 146; *Pitney v. Leonard*, 1 Paige, 461; *Hawley v. Cramer*, 4 Cowen, 717. In what cases the registry of a deed is constructive notice. *McNeil v. Magee*, 5 Mason, 244. The registry of a deed or paper, not duly or legally recorded, is not constructive notice. *Ib.*

The rules that a purchaser is in equity chargeable with constructive notice of facts and circumstances which came to the knowledge of his attorney, or agent for the purchase, or in the examination of the title, and that notice of a deed, is a constructive notice of the contents thereof, do not apply to controversies between the vendor and purchaser in relation to their own rights. These rules as to constructive notice, are only adopted by the court of chancery, for the protection of the prior equitable rights of third persons, against subsequent purchasers who claim in hostility to such rights. *Champlin v. Layton*, 6 Paige, 189. A mortgagee was told that a person was drawing, or about to draw another mortgage on the same property, and on another occasion he stated to a party interested that he had examined the clerk's office, &c., and that he had frequently transactions with the mortgagor, whose embarrassments were notorious. Held that these facts are sufficient to affect him with notice, or at least, to repel his claim of a right to tack subsequent advances to his mortgage debt. *Averill v. Guthrie*, 8 Dana, 82. The registration of a second mortgage which passes only the equity of redemption does not operate as notice. *Ib.* A purchaser from a mortgagor, with notice, cannot claim a title by possession, against the mortgagee. The mortgage being recorded, is legal notice. *Thayer v. Granger*, 1 M'Cord's Ch. Rep. 395. A derivative purchaser with notice, is protected by the want of notice in him under whom he claims. *Curtis v. Lunn*, 6 Munf. 42; *Lacy v. Wilson*, 6 Munf. 313; *Lindsey v. Rankin*, 4 Bibb, 482; *Bumpus v. Platner*, 1 Johns. Ch. Rep. 213; *M'Nitt v. Logan*, Litt. Sel. Ca. 69; *Hagthorp v. Hook's adm'r.*, 1 Gill & Johns. 273. A vendee with notice of a prior equity, holds subject to that equity. *Yoder v. Swope*, 3 Bibb, 204. A final decree is not notice to a purchaser. *Turner v. Crebill*, 1 Hammond, 374. The possession of a tenant is notice to a purchaser of the reversion, of the actual interest of the tenant, and of the extent of that interest; and the purchaser is bound to admit every claim of the tenant, which he could enforce against the vendor. *Chesterman v. Gardner*, 4

Chap. XV. sary to specify the instrument under which the claimant is entitled.

Johns. Ch. Rep. 29. Though a purchaser at a public sale be chargeable with notice, yet a *bona fide* purchaser under him is not affected by his notice. *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 147. Whatever is sufficient to put the purchaser upon inquiry is good notice in equity. Thus where a bill was filed against a trustee, enjoining him from selling certain lands, of which the description in the bill was general, as of lands in a certain patent, held, that the vendee who had bought prior to the filing of the bill, and given a bond and mortgage to the trustee for the purchase money, became chargeable with notice of the trust. *Green v. Slater*, 4 Johns. Ch. Rep. 47. Where an equitable charge upon the land devised, is created by the will of the testator, a subsequent purchaser from the devisee, who is obliged to make title to the premises through the will, has constructive notice of the charge, and takes the land subject thereto. *Morris v. Fly*, 7 Paige, 421. A plea of *bona fide* purchaser, without notice, must aver, not only a want of notice at the time of the purchase, but also, at the time of its completion, and the payment of the money. The money must have been actually paid before notice. *Thomas v. Graham*, Walker's Ch. Rep. 117. It is not enough that the party has secured the money; he must have paid it, or become bound in such a way that chancery could not relieve him from the payment of it. *Ib.* Actual notice to the master of a boat, of a lien upon it, by the service of process of sequestration, is constructive notice to the owners. And though they may have purchased after the accrual of the lien, so far as the purchase-money remains unpaid, at the time of the service of the process they will be as much bound by that notice as they would have been by notice before their purchase. Yet if they were purchasers under a valid decree in favor of creditors who had no notice of the lien, as those creditors would not be bound by it, and the purchasers under that decree, would be subrogated to their rights, those purchasers would not be affected by the lien, or any notice they may have had of it. *Case et al. v. Wooley*, 6 Dana, 19. An equitable title to land will prevail in chancery against the legal title acquired by a purchaser under execution, who had notice of the equity before his purchase; but his purchase might perhaps relate back to the time of the levy, or even to a time when the lien on the land accrued by force of the execution. The act concerning conveyances relates to the legal title only leaving the equities untouched. It takes from the holder of an unrecorded deed his legal priority, and leaves him without any advantage over the general creditor; but the omission to record the deed does not impair the grantor's equity. *Morton v. Robards*, 4 Dana, 258. Held by the court, that if a creditor comes to enforce his judgment he has notice of an unrecorded deed, such notice may be sufficient to preserve the superiority of the equity evidenced by the deed, though he had no notice of it when his debt was contracted. *Ib.* A co-proprietor of real property derived under the same title as the other proprietors, is presumed to have full knowledge of the objects and purposes, and trusts attached to the original purchase, and for which it is then held for their common benefit. *Oliver v. Piatt*, 3 Howard, 333. The defendant R. hav-

Perhaps all these points should be cautiously acted on in practice; (f) it is one thing to say that mere "flying reports" (g) are not notice, and another to affirm that a purchaser could not be affected by a deliberate and particular statement of an adverse claim unless made either by or on behalf of the claimant; nor does there seem to be any reason why, where notice has been given to the purchaser prior to the commencement of the treaty, the court should not consider whether, (as in the case of an agent or solicitor, such notice must not have been present to his mind during the treaty; of the case cited by Sir

(f) See, as to the first and third, *Butcher v. Stapely*, 1 Vern. 363; and *Fry v. Porter*, 1 Mod. 311.

(g) *Goulds*. 147.

ing a mortgage on an estate entered into articles for the purchase of the premises; and entered into possession. The mortgagee soon after left the country; and the plaintiff having received a deed from the mortgagee, the question arose whether Robertson's claim under the articles, ought to be postponed to that of the plaintiff. There were two points on which the cause turned. 1. Had the plaintiff notice of the defendants agreement; and the charge to the jury was, that the possession of R. amounted to constructive notice of the agreement. 2. Were the articles rescinded by his proceedings on *scire facias*, declaring that he held under the mortgage. The court granted a new trial, on the ground of error in the charge, in respect to *constructive notice*. The possession, was a circumstance for the jury, but was not *ipso facto*, a legal presumption of notice. The point on which the case should have been submitted to the jury, was whether *actual notice* of the articles of agreement, was given to the plaintiff. If the plaintiff knew that fact, which amounted in equity to a sale to R. he should not have purchased: if he went on, with notice to purchase, it was at his peril. *Plumer v. Robertson et al.*, 6 Serg. & Rawle, 179.

Where the attorney who had directions to obtain an assignment of a mortgage, had been informed generally, of a prior mortgage, but could find no registry, except the registry of an assignment of the mortgagor's interest in book of deeds; held that this was not sufficient notice. The fact alone, was not enough to put a party on inquiry. The court said, the notice may have answered to put a person on inquiry, in a case where that species of notice is sufficient; but to supply the place of a registry, the law proceeds a step farther; for if the second mortgage is not registered as *bona fide*, because, in consequence of notice, it is tainted with fraud, that imputation must be supported by clear evidence. The registry of an absolute conveyance, which the attorney found was not sufficient, because here the claim is in the nature of a mortgage, in consequence of the defeasance that accompanied it. It was therefore not sufficient, notice of a mortgage. *Jackson v. Valkenburgh*, 8 Cowen, Rep. 260.

Chap. XV. E. Sugden in support of the unqualified proposition<sup>(h)</sup> it may be remarked, that considering its date,<sup>(i)</sup> and the cautious character of the Judge, (Lord Keeper Coventry,) an unwillingness to do anything which might be construed into a breach of parliamentary privilege may have influenced the decision; which was, that a Member of the House of Commons was not to be considered as affected with notice of what came to his knowledge as parliamentary business within the walls of the house.

So, the doctrine hinted at in *Jolland v. Stainbridge*, seems to be at variance with a later case where it was held that a purchaser, having notice that A. had a judgment or warrant of attorney affecting the estate, was bound in equity, although the incumbrance was in fact a mortgage;<sup>(k)</sup> so, a general recital in a deed that there were mortgages on the estate, has been held, by Lord Langdale, \*to amount to notice of a mortgage not specified in such deed.<sup>(l)</sup>

[\*404]

Purchaser, whether affected by notice of construction of doubtful instrument.

It seems probable that a purchaser, having notice of an executory instrument,—(e. g., marriage articles,)—of doubtful meaning, would, as a general rule, be bound to take notice of the construction which would be put upon it by a court of equity; and must, therefore, see, that any instrument which may have been executed in pursuance thereof, and which is material to the title, has been framed in accordance with such construction:<sup>(m)</sup> but, where a long period has elapsed since the sale, the court may decline to fix upon a purchaser a difficult construction of a doubtful instrument, although it might have granted relief as between the parties thereto if there had been no sale.<sup>(n)</sup>

Constructive notice—nature of.

Constructive notice, (which, in its general effects, is similar to actual notice),<sup>(o)</sup> has been defined to be, “evi-

(h) *East Grimsted case*, Duke's Charitable Uses, 640.

(i) A. D. 1633.

(k) *Taylor v. Baker*, 5 Pri. 306; and see 1 Ha. 58.

(l) *Farrow v. Rees*, 4 Beav. 18; and see *Lacey v. Ingle*, 2 Ph. 413; *Gibson v. Ingo*, 6 Ha. 124.

(m) See Sug. 1060; *Davies v. Davies*, 4 Beav. 54.

(n) *Thompson v. Simpson*, 1 Dru. & War. 459.

(o) *Sheldon v. Cox*, Amb. 626.



dence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted :"(p) this, perhaps, scarcely conveys a satisfactory notion of the nature of the doctrine; the reported decisions upon which, it is submitted, clearly show, that constructive notice is often held to exist in the absence of any idea by the court of the existence of actual personal knowledge; if, for instance, a purchaser, having notice of a deed as being one which affects the property, is induced to rely upon the vendor's representation as to its contents, the court will hold him bound by those contents, even although it were satisfactorily shown from the nature of the transaction that he placed implicit and *bona fide* confidence "in the good faith of the vendor;(q) so, in *Jackson v. Rowe*,(r) Sir John Leach says, "although he, (the purchaser,) may, in fact, have been ignorant of the settlement, yet, in equity, he must be fixed with all the knowledge which it was reasonable he should acquire : " constructive notice may, perhaps, be rather considered to consist in those circumstances under which the court concludes, either that the party, (personally or through his agent,) has fraudently abstained from acquiring actual notice, or has been guilty of such negligence in not availing himself of the means of acquiring it, as, if permitted, might be a cloak to fraud, and which, therefore, the common interests of society require should, in its consequences, be treated as equivalent to actual notice : what degree of negligence is sufficient for this purpose remains to be considered.

[\*405]

In a recent case, before V. C. Wigram, it was asserted by the court, that the cases in which constructive notice has been established resolve themselves into two classes; first, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected; and the court has, thereupon, bound him with constructive notice of facts and instruments to a knowledge of which he would have

Propositions  
of Wigram,  
V. C. as to  
constructive  
notice.

(p) 2 Anstr. 438; and see Sug. 1041.

(q) See 1 Phill. 253.

(r) 2 Sim. & St. 475. \*

- § Chap. XV. been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property, of which he had actual notice; and, secondly, cases in which the court has been satisfied, from the evidence before it, that the party charged has designedly abstained from inquiry, for the very purpose of avoiding notice;(s) and, in a later case, the V. C., with reference to his previous judgment, repudiates the notion, (which had been attributed to him,) "that there may not be a degree of negligence so gross that a court of equity may treat it as evidence of fraud—
- [\*406] \*impute a fraudulent motive to it—and visit it with the consequences of fraud, although (morally speaking) the party charged may be perfectly innocent;" and further remarks, "Negligence, as I understand the term, supposes a disregard of some fact known to the purchaser, which at least indicated the existence of that fact, notice of which the court imputes to the purchaser."(t)

are capable  
of extension  
—semble.

More neg-  
ligence may  
have the  
effect of  
notice.

The propositions of the V. C. seem, however, scarcely to provide for those cases in which a purchaser is affected with constructive notice, not through his personal knowledge of any fact leading him to actual notice, but by his neglect of the usual and recognized means for acquiring such knowledge or notice; for instance, a public act of parliament is notice to all the world;(u) so is a *lis pendens*,(w) if registered under the act of 2 Vict. c. 11,(x) or a deed or will registered in a register county or entered on court rolls (if the purchaser search over the period within

(s) *Jones v. Smith*, 1 Ha.; see p. 55.

(t) *West v. Reid*, 2 Hare, 257, 259.

(u) Sug. 1044; although it be a local Act, *Barraud v. Archer*, 2 Sim. 433; S. C., 2 Russ. & Myl. 751. *Quere*, as to a private Act made public; Sug. *ubi supra*.

(w) *Ibid*.

(x) See sect. 7. But it is said to be only notice of what is charged on the bill, and not of equities which may possibly arise out of the matters in question in the suit; see *Shalcross v. Dixon*, 5 Jarm. Conv. by S. 493; but see *Jennings v. Bond*, 2 J. & L. 720, *et quere*. An administration suit is a *lis pendens* as respects estates sold under the decree; *Drew v. Earl of Norbury*, 3 J. & L. 267; filing of the bill, and not service of the subpoena, is the commencement of a *lis pendens*, S. C.

which the instrument is registered(*y*) or the entry is made;) Chap. XV.  
 or a judgment entered at the Common Pleas, if the purchaser search the register; so, if a purchaser, without any fraudulent intention, (the absence of which might be evidenced by his payment of a full price for the property,) were to accept a conveyance without any previous investigation of title, relying on the mere assurance of the vendor that he was absolute owner, he would, nevertheless, be held to have constructive notice of any \*defect appearing on the title;(z) although he could be scarcely said to have actual notice of any fact indicating the existence of such defect. [\*407]

To consider, however, the cases falling within the rules laid down by V. C. Wigram, and which, with the above exceptions, seem to comprise the authorities on the subject; it has been held, that notice of a post-nuptial and apparently voluntary settlement is constructive notice of the ante-nuptial agreement on which it is founded;(a)[1] that actual notice to a purchaser of an instrument as one affecting the estate, is constructive notice of all instruments to which an examination of the first would have led him;(b) even although such prior instruments are not

Purchaser having notice of a particular fact or instrument held to have notice of connected facts and instruments.

(y) *Hodgson v. Dean*, 2 Sim. & St. 221; see, as to the extent to which a memorial is notice, *Rockard v. Fulton*, 1 J. & L. 413.

(z) See Lord Lyndhurst's remarks on *Jackson v. Rowe*, in 1 Phill. 255; and see to the same effect Sir J. Wigram's remarks in *Neesom v. Clarkson*, 2 Ha. 173, and *West v. Reid*, 2 Ha. 260.

(a) *Ferrars v. Cherry*, 2 Vern. 384; as to the authority of the case, which has been questioned, see Mr. Raithby's note, 3d ed.

(b) *Coppin v. Fernyhough*, 2 Bro. C. C. 291; *Bisco v. Earl of Banbury*, 1 Ca. in Chan. 287, 291; *Tanner v. Florence*, ib. 259, 260; *Davies v. Thomas*, 2 Y. & C. 234; (where however it was also held that notice of a prior

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[1] In the case here cited, it was held, that although a settlement was apparently voluntary, and made after marriage, yet if the purchaser had notice of the settlement, and it prove to have been made in pursuance of articles before marriage, he would be bound by it, and could not protect himself by a prior legal estate, as he ought to have inquired of the wife's relations, who were parties to the deed, whether it was voluntary, or made pursuant to an agreement before marriage. But Lord Hardwicke denied the authority of the case, and said he inclined to think it was left uncertain on the face of the settlement, whether it was made before marriage or not.

## Chap. XV.

actually recited, but there is only a recital that the property is subject to limitations which, in fact, correspond with the limitations thereby created ;(c)[2] so, a recital that the property was held upon such trusts for the use of A., B. and C., (parties to the conveyance,) "for such estates in possession, reversion, or remainder, as they became entitled to after the death of D.," was held to be notice of *prior* trusts in favor of other parties which would have been discovered by an examination of the instrument creating the trusts which were referred to in the recital ;(d)[3] so, notice of an equitable claim, as affecting an [\*408] unspecified portion of the property, \*is notice of the claim as, in fact, affecting the entirety.(e)

conveyance and of the then vendor's title was notice of his lien for unpaid purchase money, on which point the decision cannot it would seem be supported; see Sug. 879;) and *Butler v. Lord Portarlington*, 1 Dru. & War. 90; and see cases cited *supra*, n. (x.)

(c) *Neesom v. Clarkson*, 2 Hare, 163; see p. 165.

(d) *Malpas v. Ackland*, 3 Russ. 273.

(e) *Att.-Gen. v. Flint*, 4 Ha. 147.

[2] In all cases where a purchaser cannot make out a title but by a deed which leads him to another fact, whether by description of the parties, recital, or otherwise, he will be deemed conusant thereof; for it was *crassa negligentia* that he sought not after it. See *Willis v. Butcher*, 2 Binn. Rep. 466; *Irvine v. Campbell*, 6 Binn. 119.

If a man agrees to purchase under limitations in a deed, which makes it necessary, upon that transaction, for him to look into that deed, and that deed contains recitals of judgments affecting the lands he had so agreed to purchase, he is bound by those judgments, for he had a right to see the whole deed under which he purchased, and therefore must be taken to have seen the whole, and must consequently be presumed to have taken notice of every thing contained in it, affecting his purchase. See *Morris v. Vanderen*, 1 Dall. Rep. 64, 67.

Where a second purchaser had read a prior deed of conveyance for the purpose of giving his opinion as to the form of it, the court considered that they were bound to consider him as having knowledge of all the contents of the deed, not being at liberty, as a jury was, to draw a different inference. *Farnsworth v. Childs*, 4 Mass. Rep. 637.

[3] A conveyance, with a recital of the intent of the purchase, is a conveyance with notice, and the grantee will take the estate, subject to the trusts implied, as well as expressed. *Cuyler v. Bradt*, 2 Caines' Cas. in Error, 326. But a purchaser of A. a trustee, is not chargeable with notice of a trust, by means of the registry of the deed from B. to C., reciting that A. had executed a declaration of the trust. *Murray v. Ballou*, 1 Johns. Ch. Rep. 566.

So, notice of the land being in the occupation of a person other than the vendor, has been held to be notice of the occupier's equities ;(*f*) even of an agreement for the sale to him of the fee simple ;(*g*) but this has always been considered an extreme case, (*h*) and the doctrine of it has not been extended.

So, notice of the legal estate being outstanding, is notice of the trusts on which it is held ;(*i*) and notice that the title deeds are in the possession of a third party, is notice of any charge he has upon the property ;(*k*) so notice that the title is a mortgage title, seems to be notice of any dealings by the mortgagee with the mortgagor which may have kept alive the equity of redemption. (*l*) [1]

(*f*) *Allen v. Anthony*, 1 Me. 282; *Taylor v. Stibbert*, 2 Ves. jun. 437, 430; *Hiern v. Mill*, 13 Ves. 120; *Meux v. Malby*, 2 Sw. 281.

(*g*) *Daniels v. Davison*, 16 Ves. 249; 17 Ves. 433 and *Douglas v. Whitewronge*, 16 Ves. 254, cited.

(*h*) *Per V. C. Wigram*, 1 Ha. 62; and see 2 Russ & M. 629, and Sug. 1053; but see also *Penny v. Watts*, 1 Mac & G. 150.

(*i*) *Anon.* Freem. Ch. Rep. 137.

(*k*) *Hiern v. Mill*, 13 Ves.; see p. 122; *Dryden v. Frost*, 3 Myl. & Cr. 670; and see 1 Ha. 61; *Worthington v. Morgan*, 16 Sim. 547; see Sug. 1055.

(*l*) See *Hansard v. Hardy*, 18 Ves.; see p. 462.

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[1] Where a man has sufficient information to lead him to a fact, he shall be deemed conusant of it. See *Slerry v. Arden*, 1 Johns. Ch. Rep. 267; *Green v. Slayter*, 4 Johns. Ch. Rep. 38; *Willis v. Bucher*, 2 Binn. 466; *Dey v. Dunham*, 2 Johns. Ch. Rep. 182; S. C. on appeal, 15 Johns. Rep. 555. Therefore if a man knows that the legal estate is in a third person, at the time he purchases, he is bound to take notice what the trust is. So, notice that the title deeds are in another man's possession, may be held to be notice of any equitable claim which he may have on the estate, and as a security for which he held the deeds. The mere circumstance of leaving the title deeds in the hands of the mortgagor, is not, of itself, sufficient evidence of fraud, so as to postpone the first mortgagee, to a second mortgagee, who has taken the title deeds, without notice of the first mortgage. *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. Rep. 603. So where a demise is made of a leasehold estate, by way of mortgage, it is unnecessary to deliver the lease itself to the mortgagee; and the possession of it by the mortgagor, is no evidence of fraud; because the registry act, requiring the registry of mortgages, effectually secures the rights of subsequent purchasers and mortgagees, against fraud. *Johnson v. Stagg*, on appeal, 2 Johns. Rep. 510.

Notice that part of the estate was in possession of a tenant has been

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Purchaser  
held to have  
notice of  
facts which  
he ought to  
have known.

[\*409]

So, where a person, entitled only for life, represented that she was seized in fee, and conveyed as if so seized, a person claiming under her for valuable consideration was held to be affected with notice, the settlement being the only document under which she could claim the estate; <sup>(m)</sup> and, as observed by Lord Lyndhurst, <sup>(n)</sup> no one could find fault with that decision; for either the party did or he did not investigate the title; if he did not, he was guilty of great negligence; if he did, he must have seen that the party conveying to him had only a life estate; so a lessee, <sup>(o)</sup> \*or a sub-lessee, <sup>(p)</sup> has notice of the title of the

<sup>(m)</sup> *Jackson v. Rowe*, 2 Sim. & St. 472 and 475; and see *Roddy v. Williams*, 3 J. & L. 1.

<sup>(n)</sup> 1 Phil. 255; and see V. C. Wigram's remarks in *Neeson v. Clarkson*, 2 Ha. 173.

<sup>(o)</sup> *Att.-Gen. v. Backhouse*, 17 Ves. 293; *Butler v. Lord Portarlington*, 1 Dru. & W. 20.

<sup>(p)</sup> *Steedman v. Poole*, 6 Ha. 193; and see *Cosser v. Collinge*, 3 Myl. & K. 283.

held to be notice of a lease, although the purchaser took it for granted that the tenant was only so, from year to year. And if the tenant has even changed his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser; and consequently, a subsequent purchaser, although without actual notice, will be considered as a purchaser of the seller's title, subject to the equity of the tenant, the first purchaser, to have the estate conveyed to him, at the price which he had stipulated to pay to the seller. In such a case therefore, a specific performance will be decreed in favor of the tenant against the seller and the second purchaser; and they will be left to settle their rights between themselves. The cases have gone so far, that a purchaser cannot be advised to complete a contract for an estate, not in the seller's own occupation without a communication with the tenants, in order to ascertain what their interests really are. So where a tenant had an interest under an agreement posterior to the lease under which he held, the purchaser was held to be bound by it, although he had not notice of it. See 3 Sug. p. 331.

Although it is true that where a tenant is in possession of the premises, a purchaser has implied notice of the nature of his title; yet, if at the time of his purchase, the tenant in possession is not the original lessee, but merely holds under a derivative lease, and has no knowledge of the covenants contained in the original lease, it has never been considered that it was want of due diligence in the purchaser which is to fix him with implied notice, if he does not pursue his inquiries through every derivative lessee, until he arrives at the person entitled to the original lease, which can alone convey to him information of the covenants.

immediate, and, (in the case of a sub-lessee,) original lessor; so, a person has been held to be affected with notice of a fraud affecting a deed, and which the unusual manner in which it was executed, ought to have suggested to his solicitor;(q) so, where a purchaser had notice of another person having a judgment or warrant of attorney affecting the estate, and refrained from making any inquiry, he was held bound, although the incumbrance was in fact a mortgage;(r) and, as a general rule, if a person knows that another has or claims an interest in the property for which he is dealing, he is bound to inquire what that interest is, and if he omit to do so, he will be bound, although the notice was inaccurate as to the particulars or extent of such interest;(s) so, a purchaser, having notice that a legatee had released the executrix from a legacy, and that, *in lieu thereof*, the latter had, by will, devised a freehold estate to such legatee, was held to have notice of such devise being pursuant to a written agreement between the parties;(t) so,(u) a mortgagee not inquiring for the deeds, was postponed to a prior equitable incumbrancer, upon the ground(w) of his having purposely abstained from making inquiry, the mortgage being for securing a pre-existing debt; that, in short, there was wilful blindness; and it has been held, in a late case, that the mere omission to ask for the deeds is sufficient to postpone a mortgagee to the equitable lien of the actual holder.(x)

But, on the other hand, a private act of parliament, or \*a private act made public,(y) is not, in itself, notice to a purchaser; nor is registration of a deed, &c. in a County Register,(z) nor registration of a judgment at the common

Cases in which a purchaser is not affected with notice. [\*410]

(q) *Kennedy v. Green*, 3 Myl. & K. 699.

(r) *Taylor v. Baker*, 5 Pri. 306.

(s) See *Gibson v. Ingo*, 6 Ha. 124.

(t) *Penny v. Walls*, 1 Mac. & G. 150, 158.

(u) *Whitbread v. Jordan*, 1 Y. & C. 303.

(w) 1 Phil. 255.

(x) *Worthington v. Morgan*, 16 Sim. 547.

(y) 3 Bos. & P. 578; Sug. 1044.

(z) *Hodgson v. Dean*, 2 Sim. & St. 221; affirmed, see Sug. 1048.

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pleas,(a) nor the entry of a document on the court rolls of a manor,(b) notice, unless he make a search extending over a period comprising the entry in the register or court rolls, (as the case may be;) nor is a commission of bankruptcy in itself notice,(c) nor a decree in a court of equity,(d) nor a *lis pendens*, unless registered at the common pleas;(e) although in all these cases the purchaser has the means of acquiring notice.

So, notice of a past tenancy is no notice of the tenant's equitable interests;(f) nor is a purchaser from a derivative lessee affected with constructive notice of the contents of the original lease;(g) nor, although a purchaser of a lease is bound to know from whom the lessor derived his title, is he affected with notice of all the circumstances under which he so derived it;(h)[1] nor, where a sale by fiduciary vendors is apparently regular, need a purchaser inquire into collateral questions—such as the mode in which the sale has been conducted,(i) although he will be affected with notice of a breach of trust clearly deducible from facts appearing on the face of the assurance;(k) nor is notice of a tenancy constructive notice of

(a) See and consider 2 and 3 Vict. c. 11, s. 5.

(b) *Bugden v. Bignold*, 2 Y. & C. C. 377.

(c) See *Hitchcox v. Sedgwick*, on appeal, Sug. 1051.

(d) Sug. 1047.

(e) 2 and 3 Vict. c. 11, s. 7.

(f) *Miles v. Langley*, 1 Russ. & M. 39.

(g) See *Hanbury v. Litchfield*, 2 Myl. & K. 633, and 1 Ha. 62.

(h) *Att.-Gen. v. Backhouse*, 17 Ves. 293.

(i) See *Borell v. Dann*, 2 Ha. 440, 450.

(k) See *Att.-Gen. v. Pargeter*, 6 Beav. 150.

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[1] In the case here cited, a charity lease was sought to be set aside as improvidently made upon the common equity, and it appeared that some of the parties stood in the character of purchasers. Lord Eldon said, though the purchaser of a lease has never been considered as a purchaser for valuable consideration *without notice*, to the extent of not being bound to know from whom the lessor derived his title, he was not aware of any case that had gone the length that the purchaser was to take notice of all those circumstances under which the lessor derived that title. Therefore, although the parties before the court must be understood at least to have notice that the lessors were trustees for a charity, yet he could not go the length that the purchasers had notice that the lease was bad; that depending on a number of circumstances dehors the lease.



the lessor's title ;(l) nor where the vendor is himself the tenant, and has acknowledged payment of the purchase-money both in the body of the conveyance and by the usual indorsed receipt, is the tenancy notice of his lien for any part thereof which may, in fact, remain unpaid ;(m) nor will a *bona fide* purchaser, otherwise without notice, be affected by the mere circumstance of the vendor having been out of possession for many years ;(n)[1] nor does the mere absence of the title deeds seem in itself to be notice of the interest of the person holding them ;(o) although it may be otherwise if their absence is not explained or accounted for ;(p) nor does notice of the preparation of a draft seem in itself to be notice of the executed deed.(q)[2]

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(l) Sug. 1056.

(m) See *White v. Wakefield*, 7 Sim. 401.

(n) See *Oxwick v. Plumer*, Bac. Abr. Mortgage, 2., s. 3; and see 1 Ha. 63.

(o) *Plumb v. Fluit*, 2 Anstr. 432; *Evans v. Bicknell*, 6 Ves. 174; and see 1 Ha. 63, and 5 Ha. 279.

(p) *Worthington v. Morgan*, 16 Sim. 547; see *Dryden v. Frost*, 3 Myl. & Cr. 670.

(q) See *Cothay v. Sydenham*, 2 Bro. C. C. 391.

[1] In this case, A. covenanted to surrender lands to uses, which were enjoyed accordingly, although no surrender was made, and A., thirteen years afterwards, surrendered the same lands to B. for valuable consideration, without notice of the covenant. B. was holden to be entitled to the lands, and the covenantees were left to their remedy at law.

[2] "If," said Lord Thurlow, in this case, "the notice had been of a deed *actually executed*, it certainly would do, but where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise; there is no case or reasoning which goes so far as to say that a purchaser shall be affected by notice of a deed *in contemplation*."

Whatever is sufficient to put a person on inquiry is considered in equity as conveying notice, as the law imputes to a person the knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprised him. *Peters v. Goodrich*, 3 Conn. Rep. 146. Where the deed was in the usual form, from S. to himself and M., the consideration expressed was "one dollar received of S. & M., merchants, in trade under the firm of S. & Co.; and the land was released to them; to be held in such proportion as was agreed on between them. Held that the record of this deed was constructive notice to an incumbrancer under M. that the land was partnership property. *Sigourney v. Munn*, 7 Conn. Rep. 324.

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So, probably, the mere fact of attesting the execution of a deed will not fix the witness with notice of its contents ;(*r*) nor, where a purchaser is informed of the existence of an instrument which may, but does not necessarily affect the property, and he is assured that the instrument does not affect that property, but relates to other property, and he, acting fairly and honestly, believes such statement, and it turns out that he is misled, and that the instrument does relate to the property, will he be fixed with a notice of its contents :(*s*) nor will a purchaser be affected by an ambiguous recital ;(*t*) or by circumstances inducing merely a suspicion of fraud ;(*u*)[3] or by the usual trusts of a term assigned to attend the inheritance, (*w*) [4]

(*r*) See Sug. 1060, and cases cited.

(*s*) See *Jones v. Smith*, 1 Phil. 244, 253; and see *West v. Reid*, a Ha. 260.

(*t*) *Kenney v. Browne*, 3 Ridg. P. C. 512; and see 2 Ha. 175.

(*u*) Sug. 1058; *M<sup>rs</sup> Queen v. Farquhar*, 11 Ves. 467.

(*w*) Sug. 1058.

A creditor knowing of a conveyance of land made by his debtor, for a valuable consideration, which is not registered, cannot, by an attachment and levy upon the land, obtain a title against the grantee. *Priest v. Rice*, 1 Pick. Rep. 164; 4 Mass. 641; 6 ib. 487; 10 ib. 60. The case of an attachment is put upon the same footing as second purchasers. And where a creditor levies his attachment with notice that there is a prior conveyance to a *bona fide* purchaser, which, although defective, in equity conveys the fee, and is obliged to come into a court of chancery to give efficacy to his own levy, he does not stand on any better ground than a purchaser with notice. *Chamberlain v. Thompson*, 10 Conn. Rep. 243.

[3] The difficulty on the part of a purchaser is to ascertain what circumstance, independently of a direct statement of the fact, are sufficient to fix the purchaser with presumptive notice of fraud. Lord Eldon has greatly relieved this difficulty, by deciding that the mere circumstance of the father first contracting to sell the estate, and then appointing to one child, who joins in the sale, will not affect the purchaser where the contract appears to have been fair, and the purchase-money to have been paid to all the parties, and there is nothing to show that the son was not to receive a due proportion of the money.

[4] Although a term assigned generally in trust, to attend the inheritance, is equally charged with the inheritance itself, yet such a trust is not of itself notice to a purchaser, of any incumbrances; for it is notice of nothing but that there is an inheritance to be protected, and that the term is attendant. It therefore gives notice to a purchaser of nothing but what he had notice of, by the deeds making out the title to the fee. But if, in an assignment, it be declared that the term is assigned to attend the in-

where no reference is made to any particular instrument or course of limitations; so, notice of there \*being a change in the solicitors who are professionally to represent a particular interest, is not, in itself, notice of a change in the ownership of such interest.(x)

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If a modern case, where the legatee of a legacy charged on land, assigned it for value, and then, without the concurrence of the assignee, joined in mortgaging the estates first to A. and then to B., the latter mortgage being expressed to be "subject to prior incumbrances," but B. had no notice of the assignment of the legacy, and the mortgagors did not appear to have intended to include it among "prior incumbrances," B. was held to have priority of the assignee.(y)

And it appears that, as a general rule, the mere omission to make those inquiries which a prudent, cautious, and wary person would ordinarily make, is not, in itself, sufficient to fix a *bona fide* purchaser with notice of what he might have ascertained by making such inquiry;(z) the fact of the conveyance being in consideration of a pre-existing debt, would, of course, induce a doubt whether the purchaser were acting *bona fide*; but the courts seem generally disinclined to extend the doctrine of constructive notice.(a)

Purchaser  
not bound  
to use excessive caution.

The purchaser, (although an infant purchasing under the sanction of a court of equity),(b) is bound by notice to his counsel,(c) solicitor, or agent,(d) or, perhaps, trustee,(e) if acquired either in the same transaction, or in a

Notice to  
counsel,  
solicitor or  
agent is  
notice to  
purchaser.

(x) *West v. Reid*, 2 Ha. 249.

(y) *Greenwood v. Churchill*, 6 Beav. 314.

(z) See 1 Phil. 257.

(a) See 1 Phil. 254; 1 J. & L. 441; Sug. 1054; but see *Worthington v. Morgan*, 16 Sim. 547, and *Penny v. Watts*, 1 Mas. & G. 150.

(b) *Toulmin v. Steere*, 3 Mer. 210.

(c) *Sheldon v. Cox*, Amb. 624.

(d) *Toulmin v. Steere*, *ubi supra*.

(e) *Wise v. Wise*, 2 J. & L. 403.

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heritance as limited or settled by such a deed, or to protect the uses of such a settlement, as it is sometimes done, that will be notice of the deed or settlement, and consequently of all the uses of it, and the purchaser is bound to find them out at his peril. See 3 Sug. on Vend. 336.

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Although solicitor, &c. is employed by both parties, or is himself the vendor.

prior transaction but under circumstances which satisfy the court that the notice must have been recollected; (*f*) \*the presumption against such recollection would, no doubt, be stronger in the case of counsel than of a solicitor; (*g*) and, even as respects a solicitor, there seems to be a difficulty in holding that a purchaser, employing one who has not acted for the vendor, can be affected by notice acquired by him previous to retainer. (*h*)

And as a general rule, the purchaser is equally affected with notice although the solicitor, &c., be also employed by the vendor; (*i*) or be himself the vendor; (*k*) it was decided by Lord Brougham, in opposition to the opinion of Sir. J. Leach, that a client is not to be affected with notice of a prior *fraud* committed by his solicitor, which the latter would, of course, conceal; (*l*) this decision may, perhaps, be thought to be inconsistent with others, in which it has been held, that a mortgagee, employing the mortgagor as his counsel or solicitor, is affected with notice of a prior, and, *as against the client-mortgagee*,—which is sufficient to bring the case within Lord Brougham's reasoning,—*fraudulent* incumbrance created by such mortgagor; (*m*) notice to a town or country agent would, in general, be notice to the principal solicitor; (*n*) but, probably, the mere fact of the purchaser's solicitor allowing, (from motives of private friendship,) the vendor's solicitor to transact, for his own benefit, the principal part of the

(*f*) *Hargreaves v. Rothwell*, 1 Keen, 154; *Brothers v. Bence*, Fitz. 118; *Perkins v. Bradley*, 1 Ha. 219 (in which two cases the solicitor was his own client in the later transaction); *Fuller v. Bennett*, 2 Ha. 394; and see *Tylee v. Webb*, 6 Beav. 552.

(*g*) See 5 Jarm. Conv. by S. 490.

(*h*) See *Fuller v. Bennett*, 2 Ha. 394, 404, and Lord Cottenham's remark as to Mr. Wightwick's evidence in *Wilde v. Gibson*, 1 H. L. C. 624.

(*i*) *Le Neve v. Le Neve*, 3 Atk.; see p. 648; *Dryden v. Frost*, 3 M. & C. 670.

(*k*) See *Sheldon v. Cox*, Amb. 624; *Dryden v. Frost*, *ubi supra*.

(*l*) *Kennedy v. Green*, 3 Myl. & K. 699.

(*m*) *Sheldon v. Cox*, Amb. 624; *Marjoribanks v. Hovenden*, 6 Ir. Eq. Rep. 238; but see *Kendall v. Halls*, 11 Jur. 864.

(*n*) See and consider *Norris v. Le Neve*, 3 Atk. 37; Sug. 1041.

business which is usually done by the former, would not be sufficient to constitute an agency.(o)[1] Chap. XV.

(o) See *Kendall v. Halls*, 11 Jur. 864.

[1] Although the counsel, attorney, or agent, be employed only in part, and not throughout the transaction, the purchaser is equally affected by the notice. In the case of *Kennedy v. Green*, which is cited in the text, an attorney fraudulently obtained a conveyance from his client, without consideration, and without her being aware that she had transferred her interest, and he afterwards mortgaged it to a relation, who advanced money upon it *bona fide*, and without actual notice, and employed no other solicitor, and swore in his answer that he acted for himself. Held that the attorney acted in that character for his relation the mortgagee, and held him bound by the notice, which, as it happened, the deeds upon the face of them would have imparted to a solicitor, if he had used reasonable diligence. Sir John Leach, in this case, held that if the purchaser or mortgagee had employed no solicitor, he would still have been bound; because, although his own knowledge would not have led him to inquire, yet a man is not to avoid the consequences of a want of due diligence by stating that he has neglected those means which would have been required, if he had used reasonable precaution. There was an appeal, but upon this point it was unnecessary for the court to give any opinion, as the solicitor was held to have acted in that character for the mortgagee. "It was, however," says Sugden, (3 Sug. on Vend. p. 319,) "strong doctrine to hold, in a case where the plaintiff, who sought relief against the mortgagee, had, by culpable negligence, executed a conveyance to the very solicitor, without being aware of the nature of the act." Sir John Leach was of opinion that where an attorney had committed a fraud in obtaining an estate, and afterwards, upon the selling or mortgaging of it, acted as the solicitor of the purchaser or mortgagee, the latter was fixed with notice of the fraud, for his solicitor was in full possession of knowledge of the fraud, which he had himself committed, and the client was as much affected by his solicitor's knowledge of the fraud, as if the solicitor had acquired that knowledge from a third person. But upon appeal, Lord Brougham considered, that as the solicitor was the actor in the fraud, the purchaser or mortgagee could not be held to have notice of the fraud any more than the party upon whom the fraud was committed.

The notice to the counsel, attorney, or agent, must be in the same transaction. If a man purchases an estate under a deed, which happens to relate also to other lands not comprised in that purchase, and afterwards purchases the other lands, to which an apparent title is made independent of that deed, the former notice of the deed will not of itself affect him in the second transaction, for he was not bound to carry in his recollection those parts of a deed which had no relation to the particular purchase he was then about, nor to take notice of more of the deed than affected his then purchase. But where one transaction is closely followed by, and connected with, another, or where it is clear that a previous transaction was present to the mind of the solicitor, when engaged in another

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Professional  
confidential  
communications, notice  
not to be  
proved by.

\*For the purpose of fixing a purchaser with notice, the evidence of his counsel, solicitor,(p) or (probably) certificated conveyancer,(q) respectfully confidential(r) professional communications, is inadmissible; and the rule includes the clerk of the professional adviser,(s) and the agent employed by the solicitor;(t) but not (it would appear) an unprofessional agent employed by the purchaser himself,(u) unless he be used merely as the medium of communication with the professional adviser;(w) and the privilege extends to communications made by an unprofessional agent to the professional adviser;(x) but the rule does not include a solicitor whom the purchaser consults, not professionally, but as a friend, agent, or steward;(y) nor a person whom he consults as, and supposing him to be, a solicitor, but who is not so in fact;(z) nor, where the same solicitor is employed by both parties, does it extend to communications which the purchaser makes to

(p) See *Parkhurst v. Lowten*, 2 Sw. 194.

(q) See *Cromack v. Heathcote*, 2 Bro. & Bing. 4; *Gresley* on Ev. 380, 2nd ed.

(r) *Walsh v. Trevanion*, 15 Sim. 577.

(s) *Taylor v. Foster*, 2 C. & P. 195.

(t) *Steele v. Stewart*, 1 Ph. 471.

(u) *Kerr v. Gillispie*, 7 Beav. 572; and see 1 Ph. 693.

(w) *Reid v. Langlois*, 1 Mac. & G. 627.

(x) *Carpmael v. Powis*, 1 Ph. 687.

(y) See *Wilson v. Rastall*, 4 Durn. & E. 753, 759; *Greenlaw v. King*, 1 Beav. 137; and see *Blenkinsopp v. Blenkinsopp*, 10 Beav. 277; reversed on further evidence, 2 Phil. 607.

(z) *Fountain v. Young*, 6 Esp. 113.

transaction, there is no ground for the distinction by which the rule that the notice to the solicitor is notice to the client, has been restricted to the same transaction. This exception can rarely apply to the common case of a counsel or solicitor being employed by various clients at different periods, in relation to the same property, which is within the protection; but it does not apply to the case of one solicitor being employed in several transactions by the same person, and also by the different persons dealing with him. As where a mortgagor employs the same solicitor to raise money for him at different periods, from several persons, all of whom employ that solicitor, who does not disclose to the subsequent lenders the prior mortgages, yet, they being present to his mind, the several lenders will be affected by his knowledge. See 3 Sug. on Vend. p. 319, 320.

him as solicitor for the vendor; (a) nor to communications made to the solicitor from collateral quarters; (b) but it extends to all communications which take place between the purchaser and his solicitor (as such) with reference to the purchase, (c) and to documents "belonging to the purchaser which he leaves with his solicitor; (d) nor does the privilege cease by reason of the professional adviser acquiring a personal interest in the property to the title of which the confidential communication related. (e) [1]

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(a) See *Perry v. Smith*, 9 M. & W. 681.

(b) *Sawyer v. Birchmore*, 3 Myl. & K. 572. A map of the estate which the owner leaves with his solicitor for the purpose of effecting a sale is not privileged; *Doe d. Marriott v. Lord Hertford*, 13 Jur. 632.

(c) See *Carmichael v. Powis*, 1 Ph. 692; *Herring v. Cloberry*, 1 Ph. 91; *Jones v. Pugh*, 1 Ph. 96; as to forms of the demurrer, see *Walsh v. Trevanion*, 15 Sim. 577.

(d) Sug. 1062; but where land was recovered in ejectment, the solicitor of the defendant was held bound in equity to state whom he had on behalf of his client delivered the title deeds; *Banner v. Jackson*, 1 De G. & S. 472.

(e) *Chaunt v. Brown*, 7 Ha. 79.

[1] The authorities are conflicting as to whether the communications to an attorney, in order to be privileged, must relate to a suit depending, or at least prospective. In *Foster v. Hall*, 12 Pick. Rep. 89, R. an attorney was consulted by, and gave advice to, a grantor, concerning a proposed deed. He knew nothing but what the grantor communicated in a conversation and consultation held in relation to the making of the conveyance, which was now assailed as fraudulent. K. had been recently licensed as attorney, and felt that he was entitled to a fee for the directions he gave; but had never received one. The counsel for the grantor objected to his being examined, though his advice had not been given in respect to any pending suit; nor with express reference to a prospective one. The objection was allowed; and on motion for a new trial, it was denied. The question was discussed and decided on the assumption, that the advice had no connection with a present or prospective suit. The opinion of the court, was delivered by Shaw, C. J. "On the whole" said he "we are of opinion, that although this rule of privilege, having the tendency to prevent the full disclosure of the truth, ought to be construed strictly; yet still, whether we consider the principle of public policy, upon which the rule is founded, or the weight of authority, by which its extent and limits are fixed, the rule is not strictly confined to communications made for the purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations, although the purpose be to correct a defective title, by obtaining a

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Nor will purchaser be obliged to produce cases, opinions, &c.

And it appears that even the purchaser himself will not, if a suit be instituted against him, be bound to produce letters written, or cases stated for the opinion of counsel, either by himself or his solicitor, with a view either to that suit or even to a suit with third parties, if respecting

release, to avoid litigation, by compromise, to ascertain what facts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes, not connected with a suit in court."

To be privileged, the communications must be made as instructions for conducting the cause, not as mere gratuitous, and irrelevant remarks. And communications, though they do not respect a suit, if they are made with a view to professional assistance, by the client to the attorney, counsel, or solicitor, are protected. *Riggs v. Denniston*, 3 John. Cas. 198, 203. A licensed counsel or attorney, employed as such, to draw a deed, must be considered as acting in the line of his profession, and bound to conceal the facts disclosed, by the person who employs him. *Parker v. Cyster*, 4 Munf. Rep. 273. Communications made to an attorney, employed to foreclose a mortgage, by advertisement and sale under the statute of New York concerning mortgages, such communications having relation to the business of the foreclosure, and considered as confidential communications between attorney and client, and are entitled to the protection of that relation. *Wilson v. Troup*, 7 John. Ch. Rep. 25; S. C., 2 Cowen's Rep. 195,—affirmed on appeal. See *Brown v. Payson*, 6 N. H. Rep. 444 to 449. Where it appeared that a paper had been delivered to a counsel by his client, with instructions not to make use of it in court, it was held that he was not bound to produce it in evidence in another cause in which he was also counsel. *Lynd v. Judd*, 3 Day, 499. Much less is he bound to produce it in the action depending, or to testify to its contents. *Dale v. Livingston*, 4 Wend. 558. An attorney or counsellor, is not obliged to produce a paper entrusted to him by his client, in order that the grand jury may inspect it, on a charge of forgery against the client. 8 Mass. Rep. 370. See *Parker v. Yates*, 12 Moore, 521; 14 John. Rep. 391; *Brandt v. Klien*, 17 John. Rep. 335; 18 John. Rep. 330; *Rhoades's lessee v. Selin*, 4 Wash. C. C. Rep. 715, 718; *Neafies' case*, 4 City Hall Rec. 168. The secrets of his client, which an attorney or counsellor is bound to keep, are the communications and instructions of his client, relative to the management, or defence of his cause, and not any extraneous or impertinent communications. *Dixon v. Parmelee*, 2 Verm. Rep. 185. Thus that the client had concealed himself to avoid being served with process, was held not to be a privileged communication. *Riggs v. Denniston*, 3 John. Cas. 198. It has been held that if after the relation of attorney and client has ceased, the latter voluntarily repeat what he had communicated while the relation existed, the attorney is not privileged from disclosing it. *Yerdon v. Kerr*, 13 John. Rep. 492. It has been held in Massachusetts, that the attorney for the commonwealth could not be called upon to testify to what passed in the grand jury's room. *Commonwealth v. Tilden*, Feb. 1828, Norfolk County.



the same matter and involving the same question to which such letters and cases relate; nor, *a fortiori*, the opinions obtained on such letters and cases; (f) and, according to recent decisions, the same privilege seems to exist in favor of cases laid before counsel with reference to a known defect in title, although not with any view to threatened litigation; (g) but, of course, an opinion which in effect was taken for the joint benefit of the party seeking and the party refusing production is not protected. (h)

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As to the effect of notice when established;—It may be laid down, as a general rule, that a purchaser with notice, is, in equity, “bound to the same extent, and in the same manner as the person was of whom he purchased:” (i) [2] for “instance, he will be bound by a trust, or incumbrance, or by any agreement respecting the estate of which he has notice and which would have bound the estate in the hands of the vendor. (k)

Effect of notice.

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The consideration of how far the purchaser is bound by notice of an executory or executed agreement, which is,

Notice of void or voidable estates, agreements,

(f) *Holmes v. Baddeley*, 1 Ph. 476; and see earlier cases there cited.

(g) See *Pearse v. Pearse*, 1 De G. & S. 12; *Herring v. Cloberry*, 1 Ph. 91; *Holmes v. Baddeley*, *ib.* 476; *Lord Walsingham v. Goodricke*, 3 Ha. 122; *Reece v. Trye*, 9 Beav. 316; *Penruddock v. Hammond*, 11 Beav. 59, 61; but see *Beadon v. King*, 17 Sim. 34; as to cases of fraud, see *Follett v. Jefferies*, 13 Jur. 465; on appeal, 972; *Reynell v. Sprye*, 11 Beav. 618; the mere connection of the documents with the Acts impeached by the bill is no ground for their production, S. C. on appeal.

(h) *Reynell v. Sprye*, 10 Beav. 51.

(i) Sug. 1031; *Taylor v. Stibbert*, 2 Ves. jnn. 439.

(k) See *Dowell v. Dew*, 1 Y. & C. C. C. 345.

[2] If a purchaser have notice of any claim or incumbrance, his conscience is affected; and a court of equity will then not only refuse to interfere in his favor, but will assist the claimant, or incumbrancer, in establishing his claims against him; his having given a consideration, will not avail him; for, as Lord Hardwicke observes, he throws away his money voluntarily and of his own free will. See *Murray v. Finster*, 2 Johns. Ch. Rep. 155; *Murray v. Ballou*, 1 Johns. Ch. Rep. 556; *Frost v. Beekman*, 1 Johns. Ch. Rep. 288; *Champion v. Brown*, 6 Johns. Ch. Rep. 398; *Shepard v. M'Evers*, 4 Johns. Ch. Rep. 136; *Simon's Les. v. Gibson*, 1 Yeates, 291; *Davison v. Waite*, 2 Munf. 557; *Willis' Les. v. Bucher*, 2 Binn. 455; *Cuyler v. Bradt*, 2 Caines' Cas. in Error, 326; *Wilcox v. Calhoun*, 1 Wash. Rep. 41.

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etc., how far binding.

Purchaser from tenant for life and remainderman held bound to give effect to agreement by the form-er for grant of unauthorised lease : *sed qu.*

either wholly or in part, void or voidable, gives rise to questions of greater difficulty.

Where A., seised in fee, in consideration of his son's marriage settled the estate on himself for life, with remainder to his son for life, with the usual limitations in strict settlement on his son's issue, with remainder to himself (A.) in fee : and with power for A. to lease, and with his son to sell the estate ; and A. agreed to grant a lease exceeding the power ; and then A. and the son, sold the estate, the purchaser, who had notice of the agreement, was compelled to perform it at the suit of the intended lessee ; (l) Lord *Roslyn* thought that A.'s agreement bound the estate except as against the son and other remaindermen claiming under the settlement, and that the sale took the estate out of the settlement and left it indefeasibly impressed with the agreement. (m) Lord *Redesdale* has expressed an opinion that the purchaser, except to the extent of A.'s life estate and remainder in fee, ought not to have been bound : (n) Sir *E. Sugden* seems to consider (o) that the decision can be supported on the ground that the purchaser was bound to indemnify the vendor against his liability to damages under the contract, and refers to a case (p) where a copyholder having granted a lease renewable with the Lord's licence, \*and the Lord having, in the name of a trustee, purchased the copyhold interest with notice of the lease, and having refused to renew, a bill was filed by the lessee for specific performance, and Lord *Eldon* directed a case to be submitted to the Common Pleas as to whether damages could be recovered by the lessee upon the lessor's covenants, and upon receiving an opinion in the negative dismissed the bill ; this, however, can scarcely be considered a decision : and it may be doubted whether the vendor's right to an indemnity (sup-

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(l) *Taylor v. Stibbert*, 2 Ves. jun. 437.

(m) See p. 442.

(n) See 2 Scho. & Lef. 599, and *Harrison v. Dugnan*, 2 Dru. & War. 304.

(o) Sug. 1033.

(p) *Lufkin v. Nunn*, 11 Ves. 170.

posing it to exist) can give to the lessee a better hold *upon the estate* than he originally possessed. Chap. XV.

And it has been held that a purchaser who buys expressly subject to a partial interest which has no existence(*q*) or is voidable(*r*) cannot dispute the right of the party in whose favor the reservation is made; and it has even been held in Ireland(*s*) that where an estate is sold subject to void or voidable leases the vendor may set them aside for his own benefit, upon securing to the purchaser the payment of the rents and performance of the covenants;[1] but the point is treated as doubtful by Sir *E. Sugden*;*(t)* although, he judicially admits that "if a man buys an estate subject to an incumbrance, and it turns out that it is not a valid incumbrance, yet he may so buy it as not to leave him the power to impeach it."*(u)*

Purchaser buys expressly subject to non-existent or voidable interest, bound thereby.

\*In the case last referred to(*w*) where the vendors attempted to set aside leases for their own benefit without the consent of the purchaser of the reversion, *Sugden, C.*, held that they had no such equity, and could not impeach the leases unless they could also impeach the sale of the [\*418]

(*q*) *Prettyman's case*, cited in *Walton v. Earl Stanford*, 2 Vern. 279; but the rule seems to be otherwise at law, see *Doe v. Archer*, 1 Bos. & P. 531; so where a mortgage to A. falsely recited an equitable charge in favor of B. and such charge was subsequently created by the owner of the equity of redemption, it was held that A. must stand as first incumbrancer; *Frazer v. Jones*, 5 Ha. 475; affirmed, 12 Jur. 443.

(*r*) See *Neild's case*, cited 1 Moll. 453; and see *Leader v. Ahearne*, 2 Con. & L. 534.

(*s*) *Maguire v. Armstrong*, 2 B. & B. 538, 548.

(*t*) Sug. 1034.

(*u*) L. & G. tem. Sug. 215, 216; *Wood v. Marquis of Londonderry*, 10 Beav. 465.

(*w*) *Muskerry v. Chinnery*, L. & G. tem. Sug. 185.

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[1] And upon this principle, in the case here cited, where a devisee in fee, subject to an executory devise over in fee, suffered a recovery, and sold the estate, and received all the money, and he had the devisee over, joined in the conveyance (which, of course, operated as a release of the executory interest) subject to leases granted by the first devisee, it was decided that the devisee over (the event having happened upon which it was to arise) was entitled to impeach the leases for his own benefit, securing to the purchaser the rents, and the benefits of the agreements.

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reversion : (x) this decision was reversed by *Plunket, C.* ; he considered *Maguire v. Armstrong* an authority, and as founded on the clearest principles of common sense ; he however went on to observe, (y) that "the purchaser had a right to be secured in his rents by proper covenants in any new leases ; this was done in *Maguire v. Armstrong*," thus admitting the right of the purchaser to have as good a security as he had under the original leases ;—and not adverting to the impossibility of determining the relative values of covenants by the lessees and covenants by the vendors : (z) now *Maguire v. Armstrong* seems to be no authority for disregarding this difference, for the court there appears (a) to have recognized the purchaser's right to have as good a security as he before had for the rents and covenants, and to have founded its decision upon the assumption (which seems to have been acquiesced in by the plaintiff) that, in the particular case before the court, the covenants of the defendant might be considered equivalent to the covenants of the lessees. An appeal to the Lords from Lord *Plunkett's* decision went off upon another point. (b) [1]

(x) Ll. & G. tem. Sug. 219.

(y) Ll. & G. tem. Pl. 196.

(z) "I apprehend that this Court can never enter into the question whether the covenant which binds the assets of the executors and trustees of W. P. is or is not an equivalent for the original covenant by W. P.," per V. C. Shadwell, 16 Sim. 390 ; and see *Ridgway v. Gray*, 1 Mac. & G. 109.

(a) See 2 B. & B. 548.

(b) See *Sheeche v. Muskerry*, 7 Cl. & Fin. 1.

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[1] "If I buy an estate" says Sugden (3 Sug. on Vend. 310) "subject to an existing lease, and the estate is conveyed to me subject to that lease, suppose I see on the face of the lease that the tenant has given a considerable fine, and therefore I consider the rent to be amply secured, and I approve of the man himself, as a solvent tenant, am I to be told, as a purchaser, that the seller is to interfere with my property, and say to me, 'you may be content ; if I set aside the lease, it cannot affect you ;' but I should answer, 'I have the benefit of a solvent tenant, and I desire the lease may remain undisturbed.' How is the seller to set aside the lease ? What becomes of the covenants in the original lease ? Suppose a covenant against alienation, what is to become of it ? Is he himself to be the lessee ? The covenant of the seller may not be worth anything, and the value of the property may depend, as in the case of a brewery, upon the

But it seems clear on principle, that if a vendor possess any such right, the substituted security for the rent and \*covenants should be given to the purchaser before the commencement of litigation against the tenants, and should be binding whatever may be its result: for, "the very litigation might unsettle and ruin the tenant and after all prove unsuccessful."(c)

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"Where the consent of a person is essential to the validity of a lease agreed to be granted, and he himself purchases the inheritance with full notice, yet he will not be bound by it:"(d) but where land, subject to a lease of a way leave at a reserved rent determinable by the lessee, was sold apart from the rent, and the purchaser of the land agreed with the lessee to determine the lease, and entered into a different one, in order to defeat the right of the purchaser of the rent, the latter was held entitled to have it made good out of the new contract.(e)

Purchaser of land subject to easement may not determine lease of easement as against purchaser of rent reserved by lease.

(c) *Per* Sugden, C., L.L. & G. tem. Sug. 218.

(d) Sug. 1032, citing *Lufkin v. Nunn*, 11 Ves. 170.

(e) *Wood v. Marquis of Londonderry*, 10 Beav. 465.

capital and skill, of the individual tenant. The chancellor said he could not understand the equity in the absence of fraud. The seller should impeach the lease, if he mean to do so, before the sale. After the conveyance is executed, the seller ought not to be permitted to affect the relation between the tenant and his new landlord. Many cases may occur in which a man would not attempt to impeach the lease, whilst he was owner of the estate, and yet would promptly do so, if he were allowed, after he had sold the estate to another. The very litigation, might unsettle and ruin the tenant, and yet, after all, prove unsuccessful. He thought there was no equity in a person so circumstanced, to file a bill against the lessee unless he can impeach both the sale and the lease. But, upon a rehearing, Lord Chancellor Plunket, observed, that the question was simply this:—If A. having made leases, which are impeachable, sells, subject to those leases, has he a right to impeach them? The purchaser subject to leases, does not bargain for, or gain the right to meddle with them. The vendor does not part with his right to set them aside. The lessee is no party to the contract, nor does he give any consideration for gaining an indefeasible title to that to which, before, he had not a valid title. But the purchaser is entitled to be secured in his rents, by proper covenants, in any new leases to be made. The purchaser cannot withhold from the seller, the use of his name to recover his rights, as against persons who have taken invalid leases. He was a trustee to this extent, for the person who had the best right under the title, under which he purchased.

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Purchaser of  
estate in  
mortgage—  
when able to  
dispute void-  
able leases.

It was held, in a recent case, where a person, having mortgaged in fee, demised the property without the concurrence of the mortgagee, that a purchaser of the fee simple, who by one deed took a conveyance of the legal estate from the mortgagee and of the equity of redemption from the representative of the mortgagor, was not estopped at law, although he received rent from the tenant; but might eject him after the expiration of the usual notice to quit.<sup>(f)</sup>

Notice of  
fraudulent  
conveyances  
&c., immate-  
rial.

[\*420]

Notice of a conveyance which comes within the provisions of the 27 Eliz. c. 4, as being made for the purpose of defrauding purchasers,<sup>(g)</sup> or as reserving a power of revocation to the grantor,<sup>(h)</sup> is immaterial; and the purchaser's title will be good at law and in equity.

What are 'so  
considered.

It is settled that a mere voluntary conveyance (unless it be in favor of a charity,<sup>(i)</sup> is fraudulent within the meaning of the statute; *e. g.*, a conveyance in trust for creditors who are not parties to the arrangement,<sup>(k)</sup> or a post-nuptial settlement upon the settlor's wife, husband, or family,<sup>(l)</sup> unless made in pursuance of a binding<sup>(m)</sup> ante-nuptial agreement,<sup>(n)</sup> or of a further portion,<sup>(o)</sup> or of

<sup>(f)</sup> *Doe d. Lord Downe v. Thompson*, 9 Q. B. R. 1037; he would have been estopped had the mortgagor got in the legal estate prior to the conveyance, and the want of the title had not appeared on the face of the lease; see *Right d. Jefferys v. Bucknell*, 2 B. & Ad. 278.

<sup>(g)</sup> Equitable mortgagee by deposit with memorandum of agreement for a legal mortgage is a purchaser within the act; *Lister v. Turner*, 5 Ha. 281; *Ede v. Knowles*, 2 Y. & C. C. C. 172.

<sup>(h)</sup> See sect. 5.

<sup>(i)</sup> *Attorney General v. Corporation of Newcastle*, 5 Beav. 307; 12 Cl. & Fin. 402.

<sup>(k)</sup> *Leech v. Leech*, 1 Ch. Ca. 249; *Walwyn v. Coutts*, 3 Mer. 707; 3 Sim. 14; *Acton v. Woodgate*, 2 Myl. & K. 492; *Garrard v. Lord Lauderdale*, 3 Sim. 1; *Wilding v. Richards*, 1 Coll. 655; *Smith v. Keating*, 6 C. B. 136; *Simmonds v. Palles*, 2 J. & L. 489; but see *Langton v. Tracy*, 2 Ch. R. 16, and Sug. 929.

<sup>(l)</sup> *Evelyn v. Templar*, 2 Bro. C. C. 148; *Doe v. Roe*, 6 Sco. 525; *Currie v. Nind*, 1 Myl. & C. 17, a case of copyholds settled by a married woman during coverture.

<sup>(m)</sup> See 12 Ves. 74.

<sup>(n)</sup> *Griffin v. Stanhope*, Cro. Jac. 454; *Randall v. Morgan*, 12 Ves. 74; *Ex parte Hall*, 1 Ves. & B. 112; see *Battersbee v. Farrington*, 1 Sw. 106.

<sup>(o)</sup> *Brown v. Jones*, 1 Atk., see p. 190.

an agreement to pay a further portion which is afterwards paid,(p) or of the wife relinquishing her interests under an existing settlement,(q) or her jointure or dower,(r) (if married before the late act came into operation;) and in separation deeds, the covenant usually entered into by the trustees to indemnify the husband against her debts, will as against creditors,(s) and also, it is conceived, as against subsequent purchasers, support any further settlement he may make upon her: so, if a post-nuptial settlement be made with the aid of another person whose concurrence is \*essential to its full validity—as in the case of a settle- [421] ment by tenant for life and tenant in tail in remainder—this will, as a general rule, take from the instrument its voluntary character.(t)[1]

(p) S. C.

(q) *Ball v. Burnford*, Prec. in Ch. 113; *Parker v. Carter*, 4 Ha. 409.

(r) See Sug. 936.

(s) See *Worrall v. Jacob*, 3 Mer. 256; but the introduction of such a covenant is not, as has been often supposed, essential, but any other good consideration will be equally effective; see *Frampton v. Frampton*, 4 Beav. 294; *Wilson v. Wilson*, 14 Sim. 405, affirmed in D. P., 12 Jur. 467.

(t) *Myddleton v. Lord Kenyon*, 2 Ves. J. 391; see 410, and cases cited in *Doe v. Rolfe*, 8 Ad. & E., see p. 659; but see also that case, *infra*, 423.

[1] A. and B., in contemplation of marriage, executed a deed, by which a large real estate, being the wife's share and proportion of her father's real estate, was conveyed to trustees, upon certain trusts, for her benefit, and in reference to a considerable personal property, "being her share of the personal estate of her late father;" the husband covenanted that all the purchases of real estate he might make, with the above mentioned personal property of the wife, which should come to his hands during the intended marriage, should be vested in the wife, subject to certain powers in the husband; and that if, at the time of her decease, he should be in possession of any of the personal property of the wife, received from the estate of her late father, not contracted to be laid out in real estate, he would account to the trustees for the principal thereof; he not being accountable for either rent or interest on such estate or moneys. A part of the lands was sold before the execution of this marriage settlement, and the purchase secured, or paid. After the marriage, considerable sums of money were paid to the husband, a part of which consisted of interest becoming due on the estate of the wife's father, in the hands of his executors, after the date of the marriage settlement. Some of the personal property of the wife was invested in lands, upon which the husband laid out money in improvement. In an action of covenant by the executors of the

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Marriage a sufficient consideration for settlement. Whether limitations to collaterals are valid.

Marriage is, in itself, a sufficient consideration for an ante-nuptial settlement upon the husband, wife, or issue; (u) which, as against the settlor, or the heirs of the settlor, is good as in favor of collaterals: (v)[2] but, how far limitations in favor of collaterals can be supported as against subsequent *bona fide* purchasers for value, appears to be still doubtful.[3]

(u) See *Brown v. Jones*, 1 Atk. 190.

(v) *Davenport v. Bisshopp*, 1 Ph. 698; *S. C.*, 2 Y. & C. C. C. 451; in which see the earlier cases cited.

surviving trustee, it was held, that such part of the real estate as was sold before the execution of the settlement, nor the proceeds thereof, did not pass to the trustees; consequently, the husband was not bound by his covenant to account to them. Held, also, that he was not bound to account for the money he received from the executors of the wife's father, in the form of interest, which accrued subsequently to the date of the settlement. Held, also, that the husband was entitled to credit for the improvements made upon the land purchased in pursuance of the settlement. *Biddle's ex'rs v. Ash*, 1 Rawle Rep. 78.

[2] Indeed, the courts will anxiously endeavor to support a fair settlement, and nearly any consideration will be sufficient for that purpose. Therefore, if a person, whose concurrence the parties think essential, join in a settlement, his concurrence will be deemed a valuable consideration, although he did not substantially part with anything.

[3] A settlement made upon a wife after marriage, is not to be treated as wholly voluntary, where it is done in performance of a duty which a court of equity would enforce. If a man should contract a marriage by stealth, with a young lady having a considerable fortune in the hands of trustees, and he should afterwards make a suitable settlement upon her, in consideration of that fortune, the settlement would not be set aside in favor of the creditors of the husband; since a court of equity would not suffer him to take possession of her fortune without making a suitable settlement upon her. It has been said that a post-nuptial voluntary agreement, by a father, to make a provision for a child, will be specifically enforced in equity, as founded in moral duty. "But this doctrine," says Story, (1 Story's Eq. Juris., s. 372,) "although it has the support of highly respectable authorities, seems now entirely overthrown."

There has been a great deal of discussion as to how far a settlement made after marriage, in pursuance of an asserted parol agreement before marriage, is valid as against creditors, in cases affected by the statute of frauds. "There is no doubt," says Story, (1 Story's Eq. Juris., s. 374,) "that such a settlement, made in pursuance of a prior valid written agreement, would be completely effectual against creditors. But the difficulty is, whether such a settlement, executed in pursuance of a parol contract, obligatory *in foro conscientie*, ought to be protected, when made, although it might not be capable of being enforced, if not made. It is certain that



Unnecessary difficulty appears to have been thrown over the cases upon the subject, by a confusion between Chap. XV.

the mere performance of a moral duty, even of the most meritorious nature, has not been deemed sufficient to protect a voluntary conveyance, even in favor of a deeply injured party, to whom it is designed to be a compensation for injustice and deceit. And hence, the difficulty is increased of giving effect to a contract which, in its own character, although founded upon an intrinsic valuable consideration, is yet, in contemplation of law, deemed to be a *nudum pactum*. There have been some struggles, in courts of equity, to maintain the efficacy of such a *post-nuptial* settlement against creditors, where it purported to be founded upon a parol agreement before marriage recited in the settlement. But the strong inclination of these courts now seems to be to consider such a settlement incapable of support, from any evidence of a parol contract; since it is, in effect, an attempt to supersede the statute of frauds, and to let in all the mischiefs against which that statute was intended to guard the public generally, and especially to guard creditors."

A husband cannot convey land directly to the wife. *Martin v. Martin*, 1 Greenl. Rep. 394. Neither can the wife take a mortgage by assignment, when the mortgage was made by the husband. 6 Greenl. Rep. 259. A purchase in the name of the wife, may be fraudulent as against creditors. The husband, in such a case, will have a resulting trust in the land, for the benefit of his creditors. *Guthrie v. Gardner*, 19 Wend. Rep. 414. If the husband violate the marriage contract, so that in consequence thereof she is entitled to a divorce or separation, and to alimony, equity will restore the property which he holds by virtue of the marriage. *Van Duzer v. Van Duzer*, 6 Paige, 366. And the court will protect her right to such property against judgment creditors and others, except it be *bona fide* purchasers without notice. *Ib.*

"With respect to ante-nuptial agreements," says Kent, (2 Kent's Com. 172, *et seq.*) "equity will grant its aid, and enforce a specific performance of them, provided the agreement be fair and valid, and the intention of the parties consistent with the principles and the policy of the law. A voluntary deed is made good by a subsequent marriage. Equity will execute covenants in marriage articles at the instance of any person who is within the influence of the marriage consideration, and in favor of collateral relations, as all such persons rest their claims on the ground of valuable consideration. The husband and wife, and their issue, are all of them considered as within that influence, and, at the instance of any of them, equity will enforce a specific performance of the articles. Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid, both against creditors and purchasers. The marriage is itself a valuable consideration for the agreement, and sufficient to give validity to the settlement. If the person be not indebted at the time, it is settled that the post-nuptial voluntary settlement upon the wife or children, if made without any fraudulent intent, is valid against subsequent creditors. A settlement after marriage may be good, if made upon a valuable consideration. Thus, if the husband makes a settlement upon the wife, in consideration of receiving

Chap. XV. the contract and the consideration for the contract: the common form of objection is, that collaterals are "not

from the trustees of the wife possession of her equitable property, that will be a sufficient consideration to give validity to the settlement, if it was a case in which a court of equity would have directed a settlement out of the equitable estate itself, in case the husband had sought the aid of the court, in order to get possession of it. The settlement made after marriage, between the husband and wife, may be good, provided the settler has received a fair and reasonable consideration, in value, for the thing settled, so as to repel the presumption of fraud. It is a sufficient consideration to support such a settlement, that the wife relinquishes her own estate, or agrees to make a charge upon it, for the benefit of her husband, or even if she agrees to part with a contingent interest. But the amount of the consideration must be such as to bar a reasonable proportion to the value of the thing settled, and when valid, these post-nuptial settlements will prevail against existing creditors and subsequent purchasers. A settlement upon a meritorious consideration, or one not strictly valuable, but founded on some moral consideration, as gratitude, benevolence, or charity, will be good against the settler and his heirs; but whether it would be good as against creditors and purchasers, does not seem to be entirely settled, though the weight of opinion, and the policy of the law, would rather seem to be against their validity, in such a case. If the wife, previous to marriage, makes a settlement of either her real or personal estate, it is a settlement in derogation of the marital rights, and it will depend upon circumstances, whether it be valid. Where the wife, before marriage, transferred her entire estate, by deed, to trustees, who were to permit her to receive the profits during life, and no power was reserved over the principal, except the *jus disponendi* by will, a court of equity has refused, after the marriage, to modify the trust, or sustain a bill for that purpose, against the trustees by the husband and wife. In case the settlement be upon herself, her children, or any third person, it will be good in equity, if made with the knowledge of her husband. If he be actually a party to the settlement, a court of equity will not avoid it, though he be an infant at the time it was made. But if the wife was guilty of any fraud upon her husband, as by inducing him to suppose he would become possessed of her property, he may avoid the settlement, whether it be upon herself, her children, or any other person. If the settlement be upon children by a former husband, and there be no imposition practised upon the husband, the settlement would be valid without notice; and such a settlement, even in favor of a stranger, might be equally good, under the like circumstances. It is a general rule, without any exception, that whenever any agreement is entered into, for the purpose of altering the terms of a previous marriage agreement, *some only* of the persons who are parties to the marriage agreement, such subsequent agreement, is deemed fraudulent and void. The fraud consists in disappointing the hopes, and expectations raised by the marriage treaty. The law respecting marriage settlements, is essentially the same, in Pennsylvania, Virginia, North Carolina, South Carolina, Kentucky, and probably in other states, as in England, and in New York. But in Connecticut it has been decided, that

Within the consideration of the marriage:"(*w*) now, this expression is, it is submitted, scarcely accurate: if A. agreed with B. to pay him 10,000*l.*, in consideration of his conveying his estate to the use of A. for life, with remainders over in favor of strangers, and the money were paid, and the conveyance executed accordingly, a question might arise, whether the remaindermen took beneficially or in trust for A., but subsequent purchasers from B. could hardly contend that the limitations in the settlement, *ultra* A.'s life estate, were void upon the ground of the remaindermen not being "within the consideration of the 10,000*l.*" In the case of a marriage settlement, the important questions seem to be, first, whether the collaterals were within the contract? and secondly, whether (if so) there was a sufficient consideration for such a contract?

Upon the first question, (considered merely as one of \*principle,) it is submitted, that where the limitations over are in favor of the collateral relations or connections, not of the settlor, but of the other contracting party, (whether wife or husband,) the settlement itself may be considered *prima facie* evidence of such other party having stipulated for their insertion: so, where, on a settlement of the intended wife's estate, the limitations over are in favor of her own collateral relations, in derogation from the husband's marital rights by survivorship, (in case of personalty,) or as tenant by the curtesy, (in case of realty :) where, in any case, other than that last referred to, the limitations over are in favor of the collateral relations or connections of the settlor, such presumption

Such limitations should be considered within the marriage contract—when.

[\*422]

(*w*) 18 Ves. 92.

an agreement between husband and wife, during coverture, was void, and could not be enforced in chancery. The court of appeals in that state would not admit the competency of the husband and wife to contract with each other, nor the competency of the wife to hold personal estate to her separate use. Subsequently however, in *Nichols v. Palmer*, 5 Day's Rep. 47, an agreement between the husband and a third person, as trustee, though originating out of, and relating to a separation between, husband and wife, was recognized as binding." See 2 Kent's Com. p. 172 to 178 *inclusive*.

Chap. XV. cannot so readily arise; but, it might be proved that the other party stipulated for their insertion: if such a stipulation cannot be presumed or proved, the limitations must, it is conceived, be considered voluntary, and void as against a subsequent *bona fide* purchaser.

Nor do the reported cases(*x*) where limitations in a marriage settlement in favor of collaterals have been held invalid, appear to be inconsistent with the above suggestions.

If within the contract, marriage forms a sufficient consideration to support them, *seem*

As to the second point—if upon marriage the husband's estate were settled upon the wife, giving her an absolute power of sale and control over the purchase-money, effectually excluding him from any future participation therein, and without securing to him the indirect advantage of a permanent provision for her, the marriage, it is conceived, would clearly be a sufficient consideration for such a settlement; although she might at once sell the estate and hand over the purchase-money to her own relations: and, if so, upon what principle can it be contended that the marriage would not equally have been a sufficient consideration for any limitations in favor of such relations, \*which might, upon her stipulation, have been introduced into the settlement? The case of a woman marrying, and stipulating for a provision in favor of parents, or others, who had previously been dependent on her exertions for support, may suggest the hardships which might result from maintaining a contrary doctrine. The impossibility of restoring the consideration by replacing either party in his or her original *status*, is, in itself, a sufficient reason why full effect should be given to any arrangements which were considered to form the equivalent, or part of the equivalent to such consideration.(*y*)

[\*423]

Such limitations supported by

And where the settlement is made by a party other than the husband and wife,—as where, on the marriage of a

(*x*) See *Osgood v. Strode*, 2 P. Wms. 245; *Johnson v. Legard*, 3 Madd. 283; *Cotterell v. Homer*, 13 Sim. 506: *Stacpoole v. Stacpoole*, 2 Con. & L. 489.

(*y*) See *Jenkins v. Keymes* or *Keymis*, 1 Lev. 237; where it was held that the wife's marriage portion was a sufficient consideration for limitations to the issue of the husband by a second marriage.

tenant in tail, the tenant for life in possession concurs in barring the entail and re-settling the estate,—the validity of limitations in favor of other branches of the family, or (it is conceived) of strangers, seems to be unquestionable: (z) so, even the mother of the husband releasing the lands from an annuity, and accepting a substituted security for its payment, has been held a sufficient consideration for limitations in favor of her younger children. (a) A settlement, not on marriage, by tenant for life and tenant in tail, was, under special circumstances, held void as against a purchaser in a modern case; (b) but the decision seems to be disapproved of by Sir E. Sugden. (c)

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necessary concurrence of third person in the settlement;

And limitations to collaterals, which precede a limitation in favor of issue of the marriage, will, it seems, be valid: (d) so, the remoteness of a limitation, (e) or its being subsequent to a vested estate tail, (f) may perhaps be sufficient to sustain it.

or by preceding limitations to issue of marriage.

[\*424]

And a settlement by a widow, before her second marriage, upon her children by a deceased husband, is not fraudulent within the act; even although they are themselves married and have issue. (g)

Settlement by widow, valid.

A settlement or conveyance, apparently voluntary, may be supported by any evidence, (consistent with its terms,) which proves that it was in fact made for good consideration: (h) so, although originally voluntary, it may be made good by subsequent matter; e. g., the marriage of the party claiming under it beneficially (i)—even although its

Consideration not expressed may be proved.

Settlement may be supported by matter *ex post facto*.

(z) See *Jenkins v. Keymes* or *Keymis*, 1 Lev. 150, 237; *Osgood v. Strode*, 2 P. Wms., see p. 256; and *Pulvertoft v. Pulvertoft*, 18 Ves. 92.

(a) *Roe v. Milton*, 2 Wils. 356.

(b) *Doe v. Rolfe*, 8 Ad. & E. 650.

(c) Sug. 935.

(d) *Clayton v. Earl Winton*, 3 Madd. 302, n.; and see Sug. 934.

(e) 2 P. Wms. 255.

(f) See Sug. 932.

(g) *Newstead v. Searles*, 1 Atk. 265; and see *King v. Cotton*, 2 P. Wms. 674.

(h) See Sug. 938; *Pott v. Todhunter*, 2 Coll. 76; *Clifford v. Turrell*, 1 Y. & C. C. C. 138.

(i) *Kirk v. Clark*, Prec. in Ch. 275; *East India Company v. Clavel*, 2 Eq. Ca. Abr. 52, and other cases cited; 5 Bac. Abr. tit. Fraud. C.; *Johnson v. Legard*, Turn. & Russ. 294.

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existence be not shown to have been considered in the marriage treaty, *(k)*—or by a sale, for consideration, by the voluntary grantee; *(l)* [1] or, probably, (in the case of a creditors' deed,) by the fact of creditors having, upon the faith of it, refrained to enforce their remedies against the debtor. *(m)*

Whether  
heir or devi-  
see can set  
aside volun-  
tary or frau-  
dulent deed.

A settlement "really fraudulent or fraudulently kept on foot," *(n)* would seem to be void as against a *bona fide* purchaser even from the heir or devisee of the settlor, *(o)* [2] but a mere voluntary deed cannot, it would appear, be avoided by a sale by the heir: *(p)* and, of course, it will not be avoided by a subsequent conveyance apparently made for value, but in fact voluntary. *(q)*

[\*425]

Settlements  
with power  
of revocation  
fraudulent.

\*The 5th sect. of 27 Eliz., c. 4, seems to comprise all settlements, although made for valuable consideration, *(r)*

*(k)* See *Brown v. Carter*, 5 Ves. 862, see p. 876.

*(l)* *Prodgers v. Langham*, 1 Sid., see 134; *George v. Milbanke*, 9 Ves. 190.

*(m)* See *Acton v. Woodgate*, 2 Myl. & K. 492; and see also *Hinde v. Blake*, 3 Beav. 234; and *Kirwan v. Daniel*, 5 Ha. 493; and a very recent case of *Harland v. Binks*, 14 Jur. 979, Q. B.

*(n)* Sug. 928.

*(o)* *Burrell's case*, 6 Rep. 72.

*(p)* *Parker v. Carter*, 4 Ha. 409.

*(q)* *Roberts v. Williams*, 4 Ha. 130.

*(r)* See Sug. 942.

[1] *Fletcher v. Peck*, 6 Cranch Rep. 133; *Bumpus v. Platner*, 1 Johns. Ch. Rep. 213, 219; *Jackson v. Henry*, 10 Johns. Rep. 185, 197; *Astor v. Wells*, 4 Wheat. 466; *Roberts v. Anderson*, 3 Johns. Ch. Rep. 377, *et seq.*; S. C. on appeal, 18 Johns. Rep. 515; *Frost v. Beekman*, 1 Johns. Ch. Rep. 288; *Manhattan Co. v. Evertson*, 6 Paige, 457; *Sterry v. Arden*, 1 John. Ch. Rep. 261; *Argenwright v. Campbell*, 3 Hen. & Munf. 144.

[2] Therefore, if a father make a fraudulent lease, and then die, and the person claiming under him sell the estate, the purchaser shall avoid the lease, whether the vendor did or did not know of its existence. This is clearly laid down in *Burrell's case*, where the grandfather made leases to the father, who assigned them to trustees for his son, an infant, and with a colorable intent to pay debts; and the grandfather within a short time died, and the father entered and acted as owner, and neither the assignees nor the infant took any profit or paid any debts, and then the father sold the fee, and covenanted that the lands should be cleared of all leases, and it was held that the leases assigned in trust for the son, although created by the grandfather, were void against the purchaser from the father.

which reserve what is, either expressly or virtually, a power of revocation to the settlor; *e. g.*, an unlimited power to charge by way of mortgage; <sup>(s)</sup> or a power to revoke on payment of 10s., <sup>(t)</sup> or with the consent of a person nominated by the settlor: <sup>(u)</sup> but a power to charge a reasonable specified sum, <sup>(w)</sup> or to revoke upon terms which are fairly calculated to preserve the substantial rights of the parties interested under the limitations, <sup>(x)</sup> seems to be unobjectionable: and Sir E. Sugden expresses an opinion, <sup>(y)</sup> that where a settlement made for valuable consideration contains a power of revocation which is afterwards released for valuable consideration, a purchaser, buying subsequently to such release, would be postponed to the settlement: probably the result might be the same, although there were no consideration for the release, if the purchaser had notice of it: but, a secret release will not affect a purchaser. <sup>(z)</sup>

Nor will a purchaser be affected by notice of an equitable claim, if he purchase from a vendor who himself bought *bona fide* without notice. <sup>(a)</sup>[1] It has been held that, in the case of a charitable trust, want of notice, in order to be effectual, must have existed on the part of the first purchaser who held adversely to the trust; and that, if he bought with notice, the want of notice in any subsequent purchaser is immaterial. <sup>(b)</sup>[2] This is a doctrine

Purchaser with notice, buying from vendor without notice, protested.

(s) *Tarback v. Marbury*, 2 Vern. 510.

(t) See *Griffin v. Stanhope*, Cro. Jac. 455.

(u) *Twyne's case*, 3 Rep. 82, b.

(w) *Jenkins v. Keymes or Keymis*, 1 Lev. 150.

(x) See Sug. 942.

(y) *Ibid*, 943.

(z) *Bullock v. Thorne*, Moore, 615.

(a) See *Brandlyn v. Ord*, 1 Atk. 571, and *Lowther v. Carlton*, 2 Atk. 242; *Sweet v. Southcote*, 2 Bro. C. C. 66.

(b) See *East Grimsted case*, Duke's Ch. Uses, 640, A. D. 1633.

[1] This rule is consistent with the others—it is not in favor of the purchaser with notice, but of the purchaser without notice. If a different rule prevailed, he might not be able to sell the estate. See *Bumpus v. Rlatner*, 1 Johns. Ch. Rep. 213, 219; *Alexander v. Pendleton*, 8 Cranch, 462.

[2] The facts of this case were, that land given to charitable uses was intended to be sold by act of parliament, and when the bill was read in

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which the courts would probably be unwilling to \*countenance. If trust property, which has been improperly sold, finds its way back to the trustee, it becomes re-impressed with the trust, notwithstanding any want of notice on the part of intervening purchasers.(c)

Settlements  
to defraud  
creditor,  
void under  
13 Eliz. c. 5.

By the 13th Eliz. c. 5, (made perpetual by the 29th Eliz. c. 5,) conveyances made of fraud, to the intent to delay, hinder, or defraud creditors, are declared to be void: but the act is not to extend to conveyances made upon good consideration and *bona fide* to persons without notice of the intended fraud.(d) A conveyance can, it appears, be set aside as fraudulent against creditors only at the instance of a person who was a creditor at the time; though; when it shall have been set aside, subsequent creditors may be let in.(e)

On what  
terms pur-  
chaser is  
evicted in  
equity.

Where a purchaser for value is evicted in equity, under a prior title, he will be credited with all moneys expended by him in necessary repairs or permanent improvements, (except improvements made after he has discovered the defect of title;)(f)[1] and will be debited with the rents which he has received: but, unless guilty of actual fraud, or purchasing with notice of an infant's title,(g) the account will not extend to such rents as, with-

(c) *Kennedy v. Daly*, 1 Sch. & Lef.; see p. 379.

(d) Sect. 6; see *Wood v. Dixie*, 7 Q. B. 892; and see, on the general construction of the statute, *Troyne's case*, 3 Rep. 80; 1 Smith's Leading Cases, 1, and cases cited in note, and the late case of *Skyrf v. Soulbey*, 1 Mac. & G. 364, and cases cited.

(e) *Per V. C. K. B., Ede v. Knowles*, 2 Y. & C. C. C. 178.

(f) See *Kinney v. Browne*, 3 Ridg. P. C. 518; *Clare Hall v. Harding*, 6 Ha. 273.

(g) *Blomfield v. Eyre*, 8 Beav. 280.

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parliament, it was declared that the land was chargeable with a charitable use, and an offer was made to otherwise assure the charitable use. The bill, however, did not pass, and the land was afterwards sold to one of the members of the House, who spoke in the debate on the bill; yet, this notice was held not to be sufficient, because it was not known to the purchaser, except as a member of parliament.

[1] See *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. Rep. 273; *S. C.*, on appeal, 14 Johns. Rep. 15; *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370; *Witherspoon v. Anderson's ex'rs*, 3 Des. 245.



out his neglect or default, he might have received : (h) nor will he be conclusively bound by his admissions in his answers as to receipts ; (i) nor will annual rests be directed, unless a special case for that form of decree be made on the pleadings ; (k) and the decree should contain a direction for just allowances. In a recent case, where a man completed the purchase of and paid for an estate which his wife had contracted for before marriage, and then sold it without her concurrence, the purchasers, upon being evicted by the wife's heir after the husband's death, were allowed a lien on the estate for the purchase-money paid by the husband, and for moneys expended in lasting improvements from the date of his purchase, with interest ; but, accepting this relief, they were treated as mortgagees in possession, and debited with rents received, or which might, but for wilful default, have been received during the like period. (m)

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Where the purchase is of the estate of an infant, the purchaser may, it seems, be treated as a bailiff, and be charged with interest on his balances, and with such rents as he might have received but for wilful default. (n)

If the estate belonged to infant.

Where land vested in trustees upon an express trust is sold by them in breach of trust, the conveyance to the purchaser sets the statute of limitations running as against the *cestuis que trust* ; (o) but, as we have already seen (p) a much shorter time than the statutory limit will bar a *cestui que trust* who, without reasonable excuse, knowingly neglects to prosecute his claim to the property. In cases of concealed fraud, the statute does not begin to run until the fraud is or might be discovered. (q)

Statute of limitations begins to run on conveyance by trustees.

(h) *Howell v. Howell*, 2 Myl. & Cr. 478.

(i) *S. C.*

(k) *Neesom v. Clarkson*, 4 Ha. 97 ; see *Donovan v. Fricker*, Jac. 165.

(l) *Howell v. Howell*, 2 Myl. & Cr. 478.

(m) See *Neesom v. Clarkson*, 2 Ha. 176 ; 4 Ha. 97 ; *quære* whether an allowance should not have been made for interest upon the difference between Clarkson's and Syke's purchase-money, the account of rents and profits being carried back to the date of Syke's purchase ?

(n) *Blomfield v. Eyre*, 8 Beav. 250 ; and see *Wyllie v. Ellice*, 6 Ha. 505.

(o) 3 and 4 Will. IV. c. 27, s. 25.

(p) *Supra*, p. 25.

(q) See sect. 26.

\*(6.) *As to contribution to paramount charges.*

Where an estate subject to a paramount charge becomes divided amongst several *bona fide* purchasers, it becomes a matter of some difficulty to determine the proportions in which they are to bear it as between themselves. The authorities on the subject will be found stated in full in a learned note by the editor of Mr. Jarman's work on conveyancing,<sup>(r)</sup> and seem to lead to the following conclusions, viz.:

If two estates, X. and Y., are subject to a common charge, and estate X. be sold to A., A. will, as against the vendor and his representatives, have a *prima facie* equity in the absence of express agreement, and whether or no he had notice of the charge, to throw it on estate Y., in exoneration of estate X.<sup>(s)</sup>

If, then, estate Y. be subsequently sold to B. with notice of the charge and of the prior sale of X. to A., B. purchases with notice of A.'s equity, and the entire charge must rest upon Y.<sup>(t)</sup>

If B., at the time of his purchase, have notice of the charge as affecting Y., but be not led to suppose that estate X. is also subject to it, or if he purchase without notice of the charge, and A. purchased with notice of the charge as affecting Y. in either of these cases, it is conceived, B.'s equity is inferior to A.'s, and the entire charge must rest upon Y.

[\*429]

If B. purchase with notice of the charge as affecting Y., and with no notice of the sale to A., and be led to suppose that X. is subject to the charge, or if both purchase without notice of the charge, B.'s equity would appear in either case to be equal in decree to A.'s; so that, either \*party, by taking a transfer of the charge and the securities, (supposing them to be such as to give the incumbrancer a claim at law against the two estates,) would, it is conceived, be able to throw the charge exclusively

(r) Vol. IX. pp. 127, *et seq.*

(s) The marginal note to *Barnes v. Racster*, 1 Y. & C. C. C. 401, is incorrect; the first mortgage in that case was of only *one* estate, see p. 403.

(t) See and consider *Hamilton v. Roysce*, 2 Sch. & Lef. 315, 326.

upon the other; (u) so, the incumbrancer himself, if able to proceed at law against the estates, might proceed against the two in such proportions, or against such one only, as he saw fit; and the purchasers, if they had the legal estate, (as might happen in the case of the incumbrance being a rent charge,) would have no remedy as between themselves; but if their estates were equitable, or if the incumbrancer were obliged to, or did, in fact, resort to a court in equity for payment of his claim, then, the equities being equal, A.'s would prevail as being prior in date.

(7.) *As to the rights of third parties after conveyance in various cases.*

The Lands Clauses Consolidation Act, 1845, contains provisions which enable the promoters of an undertaking, upon the discovery at any time of the existence of any outstanding estates or interests, to purchase the same compulsorily. (w)

Provision in Lands Clauses Consolidation Act, 1845, for purchase of interests omitted to be purchased.

In a recent case, where an estate was devised to A. subject to the payment of a legacy, which was held to charge only the estate and not A. personally; and A. sold the estate to B. with notice of the legacy, but without any reduction of purchase-money being made in respect thereof, (the parties having determined that the charge was, upon technical grounds, inoperative,) it was held that the legatee could not treat A. as a trustee in respect of so much of the purchase-money as would answer the legacy. (x)

Estate sold for full value, being in fact subject to a charge known to both parties, but supposed to be invalid, incumbrancer has no claim against vendor for purchase-money.

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Where a mortgagee purchases and takes a conveyance of the equity of redemption, he thereby lets in all subsequent incumbrances of which he had notice. (y) [1]

Effect of conveyance of equity of redemption to mortgagee.

(u) See *Tilley v. Davies*, 2 Y. & C. C. C. 399; and see *Sober v. Kemp*, 6 Ha. 155.

(v) See 8 Vict. c. 18, s. 124, *et seq.*; as to the effect of a conveyance of copyholds according to a form prescribed in a private act, see *Grand Junction Canal Company v. Dimes*, 15 Sim. 402.

(x) *Jillard v. Edgar*, 13 Jur. 1114; and see *Kent v. Newman*, on appeal, *ibid.* 1115; reported on hearing at the rolls, 1 Mer. 241.

(y) *Greswold v. Marsham*, 2 Ch. Ca. 170; *Brown v. Slead*, 5 Sim. 535;

[1] By the first principles of equity, a purchaser with notice of any in-

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Mortgagee  
selling after  
foreclosure  
cannot  
resort to  
collateral  
security.

Purchaser  
from mort-  
gagee under  
power of  
sale, bound  
by agree-  
ment with  
mortgagor  
to allow him  
to redeem.

Conveyance  
determines  
parol li-  
cense.

If a mortgagee, after foreclosure, fairly sell the estate for less than the amount due to him, he cannot afterwards recover from the mortgagor, upon his collateral personal security, the amount remaining unsatisfied.(z)

A person who having contracted with a mortgagee for the purchase of the property under his power of sale, entered into a subsequent agreement with the mortgagor to allow him to redeem, and then took a conveyance of the property, has been held bound by such agreement.(a)

The conveyance, we may remark, puts an end to a parol license from the vendor to a stranger, to enjoy an easement over the estate; and if he afterwards enter on the land, his ignorance of the sale will be no defence to an action of trespass at the suit of the purchaser.(b)

Purchaser of  
part of rent-  
charge may  
distrain.

It would appear that if, upon the purchase of a rent-charge, the same be conveyed to several purchasers, each may distrain upon the tenant before attornment.(c)

Purchaser  
when liable  
for nuisance.

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In *Rex v. Pedley*,(d) it was laid down by Littledale, J., that if a man purchase premises with a nuisance upon them, though there be a demise for a term at the time of the purchase, so that he has no opportunity of removing the nuisance, yet by purchasing the reversion, he makes himself liable for the nuisance. But if, after the reversion is purchased, the nuisance is created by the occupier, the reversioner incurs no liability. Yet if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. He is not to let the land with a nuisance upon it. But in a late case,(e) the court of C. P.

and see *Toulmin v. Steere*, 3 Mer. 210; *Smith v. Phillips*, 1 Keen, 694; *quære*, whether the same would be the effect of a mere contract for purchase; see *Watts v. Symes*, 16 Sim. 640, and also the third point decided in *Mocatta v. Murgatroyd*, 1 P. Wms. 393.

(z) *Lockhart v. Hardy*, 9 Beav. 349.

(a) *Orme v. Wright*, 3 Jur. 19.

(b) *Wallis v. Harrison*, 4 M. & W. 538.

(c) *Rivis v. Watson*, 5 M. & W. 255.

(d) 1 Ad. & E. see 827; and see *Rosewell v. Prior*, 2 Salk. 460.

(e) *Rich v. Basterfield*, 4 C. B. 783, 805.

cumbrance, is bound by it, in the same manner as the person was of whom he purchased. See *Wadsworth v. Wendell*, 5 Johns. Ch. Rep. 224.

held that—although a man may be liable for demising, Chap. XV. premises when the nuisance exists, or for reletting them after their user has created a nuisance, or for not doing that which he had undertaken to do, and which would have prevented the nuisance—yet he is not responsible for the act of his tenant in creating a nuisance by the manner in which he uses the premises—they being such as may or may not become a nuisance.

## \*CHAPTER XVI.

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AS TO THE RIGHTS UNDER THE CONVEYANCE OF JOINT PURCHASERS, AND PERSONS OTHER THAN THE NOMINAL PURCHASERS.

1. *As to joint purchasers.*
2. *As to purchasers in name of nominal purchaser.*

(1.) A CONVEYANCE of land to two or more persons, without words indicating that they are to take as tenants in common, constitutes at law a joint tenancy ;(a) and the rule is the same in equity, if they advance the money in equal proportions,(b) and do not purchase as partners, or for the purposes of trade or speculation.[1]

Purchasers  
joint-tenants  
at law, when  
so in equity.

If, however, two purchase, and one advance more of

Not if they  
contribute

(a) Co. Litt. 180.(b)

(b) Sug. 901.

[1] Where the parties advance the money equally, it is reasonable to presume that they purchased with a view to the benefit of survivorship ; but where the money is advanced in unequal proportions, and it does not appear that there was any intention to benefit the one advancing the smaller proportion, there is a fair presumption that no such intention existed. The inequality of proportion in such a case, cannot be attributed to the relative value of the lives, because neither of the parties can be supposed not to know that the other may, immediately after the purchase, compel a large partition of the estate, or may even sever the joint tenancy by a clandestine act.

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unequally  
to purchase  
money;

[\*433]

the purchase-money than the other, there will, in equity, be no survivorship, although there are no words indicating a tenancy in common;(c)[1] but they will, in the absence of any stipulation to the contrary, be interested in proportion to their shares of the purchase money. In *Lake v. Gibson*,(d) the proposition is qualified by the expression, "if the proportions of the money are not equal, and this appears on the deed itself," and the dictum is thus cited by Sir E. Sugden;(e) but the rule is laid down by Lord Hardwicke without qualification.(f) It is, however, conceived, that the inequality in the sums advanced, must, to \*have this effect, be in accordance with the original or some subsequent express agreement between the parties; and not be the mere result of any temporary pecuniary arrangement at the time of the completion of the purchase.(g)

(c) *Rigden v. Vallier*, 2 Ves. sen. 252, 258; S. C., 3 Atk. 631, 735.

(d) 1 Eq. Ca. Ab. 291.

(e) Sug. 902.

(f) 2 Ves. sen. 258; 3 Atk. 735.

(g) See *Wood v. Birch*, Sug. 905.

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[2] The common law favored title by joint tenancy on account of the right of survivorship; its policy being averse to the division of tenures, because it tended to multiply the feudal services, and weaken the efficacy of that connexion. It has been said that the reason of that policy ceased with the abolition of tenures, and that courts of law are no longer inclined to favor them. At any rate they are not favored in equity, for they are a kind of estates that make no provision for posterity. As an instance of the equity view of the subject, we find that the rule of survivorship is not applied to the case of money loaned by two or more creditors on a joint mortgage. The right of survivorship is also rejected in all cases of partnerships, for it would operate very unjustly in such cases. "In this country," says Kent, (2 Kent Com. 361,) "the title by joint tenancy is very much reduced in extent, and the incident of survivorship is still more extensively destroyed, except where it is proper and necessary, as in the case of titles held by trustees. In New York, estates in joint tenancy were abolished as early as 1786, except in executors and other trustees, unless the estate was expressly declared in the deed or will creating it, to pass in joint tenancy. By the revised statutes of New York, every estate vested in executors or trustees as such is held in joint tenancy. The doctrine of survivorship incident to joint tenancy (excepting estates held in trust) is abolished in the States of Connecticut, Pennsylvania, Virginia, Kentucky, Indiana, Missouri, Tennessee, North Carolina, and Alabama. In Maine, New Hampshire, Massachusetts, Rhode Island, Vermont, New Jersey,

So, where land is conveyed to partners as joint-tenants for the purposes of trade, there is no survivorship in equity; (h) so, also, if it be conveyed to purchasers, not otherwise in partnership, as joint-tenants, but for the purpose of a joint adventure or speculation; (i) "the purchase of the land being made to the intent that they shall become partners in the improvement; it being only the substratum for an adventure in the profits of which it was intended they should be concerned." (k)

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or purchase  
for the pur-  
pose of  
trade or  
speculation;

So, if joint-tenants subsequently contract to deal with the property as if in trade, the court will receive evidence of such a contract; and will hold that there is no survivorship. (l)

or, being  
joint-tenants, sub-  
sequently  
agree to  
hold prop-  
erty as if  
in trade.

And where partners purchased land out of partnership profits, and let it, but brought the profits into the partnership accounts, it was held that there was no survivorship; although the conveyance was to them as joint-tenants. (m)

And, in the case of a joint-purchase, if one joint-tenant \*lay out money in repairs or improvements, (n)—which

Joint-ten-  
ant has lien  
[\*434]

(h) *Morris v. Barrett*, 3 Y. & J. 384; *Elliot v. Brown*, 3 Sw. 489; *Houghton v. Houghton*, 11 Sim. 491.

(i) *Lake v. Craddock*, 3 P. Wms. 168; *Lyster v. Dolland*, 1 Ves. jun. 431; *Dale v. Hamilton*, 5 Ha. 369; 2 Ph. 266.

(k) *Per Lord Eldon*, 9 Ves. 597.

(l) *Jeffereys v. Small*, 1 Vern. 217; see 5 Ha. 384.

(m) *Morris v. Barrett*, 3 Y. & J. 384. The share of a deceased partner in the freehold or copyhold estates of the partnership, is not liable to probate duty; *Custance v. Bradshaw*, 4 Ha. 315. As to the relative rights of his real and personal representatives, the following is stated by Mr. Bisset to be the clear result of the cases: viz. "that in the absence of a specific agreement to the contrary, real estate purchased with partnership funds for partnership purposes, is converted out and out into personal estate, and therefore goes to the personal representative, and not to the heir of a deceased partner; but that real estate purchased with partnership property, but not for partnership purposes, is not converted into personality." Bisset on Partnership, 56.

(n) *Lake v. Gibson*, 1 Eq. Ca. Abr. 291.

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Michigan, Illinois, and Delaware, joint tenancy is placed under the same restrictions as in New York; and it cannot be created but by express words; and when lawfully created, it is presumed that the common law incidents belonging to that tenancy follow. The English law of joint tenancy does not exist at all in Ohio and Louisiana, and it exists in full force in Georgia, Mississippi, and Maryland."

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on estate  
for ex-  
penses of  
repairs, &c.,  
and renewal  
fines.

Any advan-  
tage secured  
by purchas-  
er standing

may be either necessary, or sanctioned by the other joint-tenants—or, in the case of renewable leaseholds, advance money for the expense of a renewal,<sup>(o)</sup> he has a lien upon the estate for the amount: but if one purchaser advance more than his share of the purchase-money, he acquires no lien on the estate; nor, it would appear, has he any remedy except a suit for contribution.<sup>(p)</sup>[1]

And, where purchasers stand in the relation of partners, any advantage secured by one,—*e. g.*, the renewal of a

(o) See *Hamilton v. Denny*, 1 Ball & B. 199.

(p) See *Wood v. Birch*, Sug. 905.

[1] Where two or more persons agree for the purchase of an estate in moieties between them, subject to incumbrances, which are to be discharged out of the purchase-money, the purchase is, in equity, considered to be made for their equal benefit *and on a mutual trust between them*; and therefore although one of them may have abatements made to him by some of the incumbrancers, of sums due, for interest, or otherwise, in consideration of services and friendships, and it is expressly agreed to be to his own use, yet equity will compel him to account to the other for the benefit of these advantages. So a new lease obtained by one partner enures to both, although he obtained it clandestinely, and on his own account. See 3 Sug. 169, *and cases cited*.

It seems that where two or more persons purchase an estate, and one, for instance, pays all the money, and the estate is conveyed to them both, the one who paid the money, cannot call upon those who paid no part of it, to repay him their shares of the purchase money, or to convey their shares of the estate to him: for by payment of all the money, he gains neither a lien, nor a mortgage, because there is no contract for either; nor can it be construed a resulting trust, as such a trust cannot arise at an after period; and perhaps the only remedy he has, is to file a bill against them for a contribution. Whenever therefore two persons agree to purchase an estate, it should be stipulated in the agreement, that if, by the default of either of them, the other shall be compelled to pay the whole, or greater part of the purchase money, the estate shall be conveyed to him, and he shall hold the entirety against the other and his heirs, unless he or they, shall, within a stated time, repay the sum advanced, on their account, with interest, in the meantime. *Ib.*

If two persons purchase an estate subject to a mortgage, and the mortgage money is apportioned between them, and each of them covenants with the other to pay his share of the money, and to indemnify the other from it, they do not, by those means, make their personal estate, as between their real and personal representatives, the primary fund for payment of the mortgage money. *Ib.* See *Gibson v. Crehore*, 5 Pick. Rep. 152; *Parkman v. Welch*, 19 Pick. 231.



lease,(*q*) or an abatement of incumbrances charged on the property,(*r*)—enures to the benefit of the others.

If the land is bought as a speculation—*e. g.*, under an agreement between the partners that it shall be laid out, allotted, and sold for building purposes—no partner can enforce a partition or sale in contravention of the terms of such agreement:(*s*) if, however, the management of the concern be entrusted to certain partners, who refuse to execute the duty they have undertaken, the court will, upon a suit being instituted by another partner, take on itself, so far as it can, to put him in the situation in which he would have been had the trusts been properly performed.(*t*)

Where, upon an agreement for a joint-purchase, the conveyance is taken in the names of some but not all of the intended purchasers, the interests of the others may be established by any subsequent writing signed by the fiduciary partners, and which acknowledges or proves the existence \*of the trust:(*u*) and this, although the agreement be that the one purchaser shall find the money, and the other contribute his skill in purchasing and subsequently allotting and selling the land:(*w*) it seems, however, to be the better opinion,(*x*) that the mere fact of one of two parties in treaty for an estate desisting therefrom under a parol agreement that the other shall complete for their joint benefit, is not such a part performance as takes the case out of the statute of frauds; and that, in the absence of any subsequent written admission of the trust, the aggrieved party, unless he can establish a resulting trust, by proof of his having paid or contributed to the purchase-money, has no remedy. There is this distinc-

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as a partner, enures to benefit of his copartners.

On joint-purchase by way of speculation, partner must conform to agreement.

If conveyance be not taken in names of all the purchasers, trust may be proved by any subsequent writing signed by nominal purchasers.

[\*435]

(*q*) *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Clegg v. Fishwick*, 1 Mac. & G. 294.

(*r*) See *Carter v. Horne*, 1 Eq. Ca. Abr. 7, which according to the report was a mere case of a joint-purchase; and see 1 Mac. & G. 300.

(*s*) *Peck v. Cardwell*, 2 Beav. 137; and see *Dale v. Hamilton*, 2 Ph. 266.

(*t*) See 2 Ph. 276.

(*u*) *Forster v. Hale*, 3 Ves. 696; *S. C.*, 5 Ves. 308.

(*w*) *Dale v. Hamilton*, 2 Ph. 266.

(*x*) *Sug.* 907.

tion between agreements and declaration of trust ; in the one, it is the agreement itself, which is the origin of the interest, that must be in writing : in the case of a declaration of trust, which is only the recognition of a pre-existing interest, it is the evidence and recognition, and not the origin of the transaction which must be in writing : (y) and, of course, it is not necessary that the party seeking to enforce the declaration of trust, should himself have been a party to it. (z) [1]

(2.) *As to purchases in the name of a nominal purchaser.*

So, if consideration has been paid by others than nominal purchasers, there will be a resulting trust without writing.

[\*436]

Where, upon a purchase, either by one or several, the conveyance is taken in the names of strangers ; or, where, in the case of a joint-purchase, the conveyance is taken in the names of some, but not all, of the purchasers who pay for the estate, (a) there will,—subject to the exceptions \*subsequently noticed, and subject, of course, to any express stipulation (even by parol) on the point, (b)—be a resulting trust in favor of the other parties who have paid or helped to pay the consideration-money : and this, whatever may be the tenure of the estate, or the mode in which the property is conveyed ; (c) unless the effect would be to break in upon the policy of an act of parliament : (d) and

(y) *Per* Lord Cottenham, 2 Ph. 275 ; See *Donohoe v. Conraky*, 2 J. & L. 688.

(z) 2 Ph. 275.

(a) *Wray v. Steele*, 2 Ves. & B. 388.

(b) See *Lady Bellasis v. Compton*, 2 Vern. 294.

(c) See *Dyer v. Dyer*, 2 Cox, 92, 93.

(d) See Sug. 908.

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[1] Where two or more persons purchase an estate, and the conveyance is taken in the name of one of them, the trust may be proved by letters written subsequently to the purchase ; for the statute of frauds does not require that a trust shall be created by a writing ; but that it shall be *manifested and proved* by writing, which means that there shall be evidence in writing, proving that there was such a trust. See *Boyd v. M'Lean*, 1 John. Ch. Rep. 582 ; *Botsford v. Burr*, 2 Johns. Ch. Rep. 405 ; *Henderson v. Hudson*, 1 Munf. Rep. 510 ; *Moran v. Hays*, 1 John. Ch. Rep. 339 ; *Jackson v. Pierce*, 2 John. Rep. 223 ; *Freyport v. Bartol*, 3 Greenl. 340 ; *Norton v. Preston*, 3 Shepl. Rep. 14.

no written declaration of trust is necessary ; resulting trusts being expressly excluded from the operation of the statute of frauds.<sup>(e)</sup> But, it is conceived, the mere fact of the money being so paid, not in pursuance of the original agreement, but either as a matter of necessity, or by virtue of a pecuniary arrangement between the parties at the time of completion, would not have this effect :<sup>(f)</sup> if, for instance, A. and B. agree to purchase an estate, the money as between themselves to be advanced in certain specified proportions, and, at the time fixed for completion, A., either through B.'s temporary inability to pay, or merely for his convenience, advance the entire amount, this, it appears, will not give A. a claim to the whole estate.<sup>(g)</sup>[1]

(e) 29 Car. II. c. 3, s. 8.

(f) See *Wood v. Birch*, Sug. 905.

(g) S. C.

[1] "In addition to the various direct modes of creating trust estates, there are resulting trusts implied by law, from the manifest intention of the parties, and the nature and justice of the case ; and such trusts are expressly excepted from the operation of the statute of frauds. Where an estate is purchased in the name of A., and the consideration is actually paid at the time by B., there is a resulting trust in favor of B., provided the payment of the money be clearly proved. The payment *at the time*, is indispensable to the creation of the trust ; and this fact may be established, or the resulting trust rebutted by parol proof. Lord Hardwicke said, that a resulting trust arising by operation of law existed, 1. When the estate was purchased in the name of one person, and the consideration came from another. 2. When a trust was declared only as to part, and nothing was said as to the residue, that residue remaining undisposed of, remained to the heir at law. He observed that he did not know of any other instances of a resulting trust, unless in cases of fraud. The mere want of a valuable consideration will not of itself and without any auxiliary circumstance create a resulting trust, and convert a grantee into a trustee ; for this, as Mr. Saunders has truly observed, would destroy the effect of every voluntary conveyance. There must be the absence of both a consideration and a declaration of the use. If only part of the purchase money be paid by the third party, there will be a resulting trust in his favor *pro tanto* ; and the doctrine applies to a joint purchase. So if a purchase be made by a trustee, with trust moneys, a trust will result to the owner of the money. If a trustee renews a lease, the new lease will be subject to the trust affecting the old one ; and it is a general and well settled principle, that whenever a trustee or agent deals on his own account and for his own benefit with the subject entrusted to his charge, he becomes chargeable with the purchase as a trustee. There will be equally a resulting trust when the

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Custom, neg-  
ating the  
doctrine of  
resulting  
trusts, is bad

Payment of  
considera-  
tion may be  
proved by  
parol evi-  
dence.

A manorial custom that a nominal purchaser of copyholds shall, notwithstanding the doctrine of resulting trusts, take beneficially unless the trust is mentioned on the rolls of the manor, is a bad custom.(h)

For the purpose of raising a resulting trust, the mode in which the consideration has been paid may be proved by parol evidence, either during the life of the nominal

(h) See *Lewis v. Lane*, 2 Myl. & K. 449, over-ruling *Edwards v. Fidel*, 3 Madd. 237.

purposes for which an estate has been conveyed fail by accident or otherwise, either in whole or in part, if a surplus remains after the purposes of the trust are satisfied."

It is a general rule, that if an estate be purchased in the name of one person, and the price paid with money belonging to another, it will be subject to a trust for him by whom the money was advanced, even without a declaration to that effect. Such resulting interest may be sold on execution, and the legal title thereby transferred to the purchaser, by virtue of the 29 Char. II. c. 3, of which the 4th section of the New-York Statute of Uses is a copy. 1 N. Y. R. S. 74; 3 John. Rep. 216; see also *M'Guire v. M'Cowen*, 4 Desau. 491; *Perry v. Head*, 1 A. K. Marsh. 47; *Letcher v. Letcher's heirs*, 4 J. J. Marsh. 592; *Elliott v. Armstrong*, 2 Blackf. Rep. 198; *Jenison v. Graves*, ib. 440; *Doyle v. Sleeper*, 1 Dana, 536; *Boyd v. M'Lean*, 1 John. Ch. Rep. 582; *Botsford v. Burr*, 2 John. Ch. Rep. 409; 10 Paige's Rep. 193; ib. 249; ib. 504; *Guthrie v. Gardner and wife*, 19 Wend. Rep. 414. If the money be advanced by the father, and the conveyance taken in the name of a child; or by a husband, and taken in the name of the wife, in each case it will, in the first instance be deemed an advancement to them, and not a resulting trust, subject, however, to explanation. Ib.; 11 John. Rep. 96; *Page v. Page*, 8 N. H. Rep. 187. Resulting trusts are created in two ways—1st, when the purchaser pays the price out of his money, and takes a deed in the name of another; 2nd, when a trust has been declared of but part of the estate, from which the law implies an intent to reserve the beneficial ownership of the residue. *Kisler v. Kisler*, 2 Watts' Rep. 323. It is essential, in order to bring a trust of this sort within the proviso of the statute, that it arise upon a conveyance of real estate. For the proviso is confined, in express terms, to trusts arising upon conveyances. Therefore, if A. pay B. for a tract of land, and B. agree to hold the land in trust for A. in such a case, the trust is not within the meaning of the proviso, because it is not a trust arising upon a conveyance. *Jackson v. Seelye*, 16 John. Rep. 199. It is also essential that the purchase-money, when paid, should have been the money of him who sets up the trust. If A. take a conveyance of land in his own name from B., and pay the purchase-money, and, by a subsequent agreement, receive the purchase-money from C. and agree to hold the land in trust for C., this is not a trust within the proviso of the statute, because it is not a trust arising by the conveyance. *Stere v. Stere*, 5 John. Ch. Rep. 1; *Botsford v. Burr*, 2 ib. 405.

purchaser, or, according to the weight of authority, after his decease ;(i) though whether it can prevail against a direct \*denial in his answer seems to be doubtful ;(k) and it will, in any case, be received with great caution : nor can it be received to prove that a person who has paid for the estate with his own money, and taken a conveyance in his own name, was, in fact, the agent of another ;(l) or to raise a resulting trust in favor of a vendor who has conveyed the estate without receiving the purchase-money ; even although there be parol evidence to show that the transaction was really a conveyance in trust, and not a sale.(m) But where such evidence is received it need not be confied to the direct fact of payment : for instance, evidence of the poverty of the nominal purchaser has been allowed in proof of the impossibility of his having paid for the estate.(n)

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And parol evidence is admissible to prove that what purports to be an absolute conveyance, was, in fact, a mortgage.(o)

Conveyance may be shown to be a mortgage.

As a general rule, no resulting trust arises when the conveyance is taken in the name of a child,(p) grand-child(q) (if the father be dead),(r) or wife(s) of a sole(t) purchaser ; or in the names of several children, either alone(u) or associated with the wife:(w) and the rule seems to include illegitimate children, if recognized as

But, *prima facie*, there is no resulting trust on purchase in name of wife or child.

(i) *Sir Thomas Peechy's Case*, Sug. 910 ; *Lench v. Lench*, 10 Ves. 511, 517 ; 2 Mad. Ch. Pr. 141, 3rd edit.

(k) Sug. 909.

(l) *Bartlett v. Pickersgill*, 1 Cox, 15.

(m) *Leman v. Whitley*, 4 Russ. 423 ; Sir E. Sugden puts a query to this case, Sug. 911.

(n) *Willis v. Willis*, 2 Atk. 71.

(o) *Cripps v. Jee*, 4 Bro. C. C. 472.

(p) *Mumma v. Mumma*, 2 Vern. 19 ; *Grey v. Grey*, 2 Sw. 594 ; *Sidmouth v. Sidmouth*, 2 Beav. 447.

(q) See *Kilpin v. Kilpin*, 1 Myl. & K. 520 ; *Loyd v. Read*, 1 P. Wms. 607.

(r) *Ebrand v. Dancer*, 2 Ch. Ca. 26.

(s) *Glaister v. Hewer*, 8 Ves. 199.

(t) See *Finch v. Finch*, 15 Ves. 51.

(u) *S. C.*, *ib.* 43 ; *Murless v. Franklin*, 1 Sw. 13.

(w) *Back v. Andrews*, 2 Vern. 120.

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such ;(x) and persons to whom the purchaser has placed himself *in loco parentis* ;(y) \*and adult(z) as well as infant, and male as well as female children ; and to extend to purchasers by a female as well as by a male ancestor or *quasi* ancestor :(a) but not to purchases in the name of a parent,(b) brother,(c) or other remoter relative.

Although the purchaser's name be also inserted ;

or the nominee take successively.

And, although the point was otherwise decided by Lord *Hardwicke*,(d) it seems to be the better opinion(e) that the same rule will prevail, when, upon a purchase by a father, the conveyance is taken in the joint names of himself and his child ;(f) so, in the case of copyholds, the children take beneficially, although they are named to take in succession after the father ;(g) so, on a purchase by a husband in the joint names of himself and his wife, the latter surviving will take beneficially ;(h) so, if a stranger's name be also inserted, he will, it appears, take as a trustee for the children or wife, (as the case may be.)(i)

Presumption in favor of advancement may be rebutted by co-temporary acts or declarations ;

[\*439]

But although, where property is purchased in the name of a wife or child, the purchase is *prima facie*, an advancement, still, the relation between the parties is only evidence of the intention of the purchaser to advance the nominee : which evidence may be rebutted by other evidence manifesting a contrary intention. That \*cotempo-

(x) See *Beckford v. Beckford*, Loft. 490 ; and see 1 Myl. & K. 542.

(y) See *Ebrand v. Dancer*, 2 Ch. Ca. 26 ; *Currant v. Jago*, 1 Col. 261 ; a person may stand *in loco parentis* to a child living and maintained by his father ; *Powys v. Mansfield*, 3 Myl. & Cr. 359 ; *Pym v. Locker*, 5 Myl. & Cr. 29.

(z) *Grey v. Grey*, 2 Sw. 594 ; *Sidmouth v. Sidmouth*, 2 Beav. 456.

(a) See *Loyd v. Read*, 1 P. Wms. 607.

(b) See *Grey v. Grey*, 2 Sw. 598.

(c) *Maddison v. Andrew*, 1 Ves. 57, see p. 61 ; *Skeats v. Skeats*, 2 Y. & C. C. C. 9.

(d) *Stileman v. Ashdown*, 2 Atk. 477, see p. 480.

(e) See Sug. 916.

(f) *Scroope v. Scroope*, 1 Ch. Ca. 27 ; *Back v. Andrews*, 2 Vern. 120.

(g) *Dyer v. Dyer*, 2 Cox, 92 ; *Skeats v. Skeats*, 2 Y. & C. C. C. 9, overruling *Dickenson v. Shaw*, 1 Wat. Cop. 222.

(h) See *Dummer v. Pitcher*, 2 Myl. & K. 262 ; and 2 Vern. 120, 683.

(i) *Lamplugh v. Lamplugh*, 1 P. Wms. 111 ; *Crabb v. Crabb*, 1 Myl. & K. 511 ; and see 1 Myl. & K. 542 ; see however *Skeats v. Skeats*, *ubi. supra*.

aneous acts(*k*) and even cotemporaneous(*l*) declarations of the purchaser, may amount to such evidence, has been often decided)(*m*) but subsequent acts and declarations of the purchaser are not evidence to support the trust: although subsequent acts and declarations of the nominee may be so: but, generally speaking, we are to look at what was said and done at the time.(*n*)

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but not by subsequent acts of declarations of purchaser;—*aliter* of nominees.

Thus, where a copyholder, upon taking a purchase in his son's name, at the same court surrendered it to the use of his own will;(o) or, taking a purchase in the joint names of himself and two sons, at the same court took a license to lease for seventy years,(*p*) it was held to be no advancement. So, where the purchase is made with some particular object, as to sever a joint-tenancy.(*q*) But the general presumption in favor of advancement cannot be negatived or qualified by transactions relating to other estates.(*r*)

By what cotemporaneous acts or circumstances.

In the case of a child, it is a material circumstance that a provision has been previously made for him; but this is far from being decisive.(*s*) In the older cases(*t*) it was held that the child, if already fully advanced, could not take;[1] but, as observed by *Eyre*, L. C. B.,(*u*) "the father

Prior advancement of child, whether material.

(*k*) See *Prankerd v. Prankerd*, 1 Sim. & St. 1.

(*l*) Or *previous*; see 1 Myl. & K. 539.

(*m*) 2 Beav. 455; and see *Kilpin v. Kilpin*, 1 Myl. & K. 520, where the declarations were made verbally to the purchaser's solicitor.

(*n*) *Sidmouth v. Sidmouth*, 2 Beav. 447, see p. 455; and see 1 Myl. & K. 532, and 1 Coll. 267.

(*o*) *Prankerd v. Prankerd*, 1 Sim. & St. 1.

(*p*) *Swift v. Davis*, 8 East, 354, n.

(*q*) Sug. 915, citing *Baylis v. Newton*, 2 Vern. 28.

(*r*) *Murless v. Franklin*, 1 Sw. see p. 19.

(*s*) *Per* Lord Brougham, 1 Myl. & K. 542.

(*t*) See *Elliot v. Elliot*, 2 Ch. Ca. 231, A. D. 1677; *Grey v. Grey*, 2 Sw. 600, decided A. D. 1677; and see Sug. 913.

(*u*) See *Dyer v. Dyer*, 2 Cox, 94.

[1] "There is generally, says Kent, (4 Kent's Com. 417,) "In the statute laws of the several states, a provision relative to real and personal estates similar to that which exists in the English statute of distribution, concerning an advancement to a child. If any child of the intestate has been advanced by him, by settlement, either out of the real or personal estate, or both, equal, or superior, to the amount in value of the share of such child which would be due from the real and personal estate, if no

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is the only judge as to the question of a son's provision : the distinction therefore of the son being provided for or not, is not, very solidly taken or uniformly adhered to :”  
 [\*440] and it “has been observed by Lord *Eldon* that “the presumption of advancement in favor of a child is not to be frittered away by nice refinement.”(*w*) At any rate, it

(*w*) See 15 Ves. 50.

such advancement had been made, then such child and his descendants, are excluded from any share in the real or personal estate of the intestate. But if such advancement be not equal, then the child and his descendants are entitled to receive, from the real and personal estate, sufficient to make up the deficiency, and no more. The maintenance and education of a child, or the gift of money, without a view to a portion, or settlement in life, is not deemed in advancement. This is the provision as declared in the New York revised statutes, and it agrees in substance, with that in the statute laws of the other states. The basis of the whole, is the provision in the statute of distribution of 22 and 23 Charles 2; though there are a few shades of difference in the local regulations on the subject. The statutes in Maine, Vermont and Massachusetts, have mentioned the requisite evidence of the advancement; and it is to consist of a declaration to that effect, in the gift or grant of the parent, or of a charge in writing to that effect, by the intestate, or of an acknowledgment, in writing, by the child. The provision, in those states, and in Kentucky, applies equally to grandchildren; whereas, the language of the provision, is, generally, in the other states, like that in the statute of distribution, confined to an advancement to the child of the parent. It is declared in New York, that every estate or interest, given by a parent to *descendant*, by virtue of a beneficial power, or of a power in trust, with a right of selection, shall be deemed an advancement. In New Jersey, the statute uses the word *issue*, which is a word of more extensive import than the word child; though children, as well as issue, may stand in a collective sense, for grandchildren, when the justice or reason of the case requires it. It would have been better however, if the statutes on this subject, had been explicit, and not have imposed upon courts the necessity of extending, by construction, and equity, the meaning of the word child, so as to exclude a grandchild who should come unreasonably to claim his distributive share, when he had already been sufficiently settled, by advancement. In some of the states, as in Virginia, Kentucky, Alabama, and Missouri, there is a special provision, that the child who has received his advancement, in real or personal estate, may elect to throw the amount of the advancement into the common stock, and take his share of the estate descended, or his distributive share of the personal estate, as the case may be; and this is said to be bringing the advancement into *hotchpot*, and it is a proceeding which resembles the *collation bonorum*, in the civil law. I do not find, this privilege of election conceded by the laws of the other states to the child who has been advanced; and there is nothing which would appear to render the privilege of any consequence.”



appears that an advancement which is, (x) or which the parent considers to be (y) only in part, will not rebut the presumption of advancement: a reversion expectant on a life estate, is *prima facie* only a part advancement. (z)

A subsequent parol admission by a child that he holds only as trustee, may rebut the presumption in favor of advancement; (a) but the fact that the child, even although adult, allows the parent to take and keep possession, (b) is insufficient; nor is the result altered by the child actively assisting the parent in taking the profits; as, in the case of a purchase of stock in the child's name, by his executing a power of attorney for the father to receive the dividends; (c) or by money being subsequently laid out on the property by the parent. (d)

But although, as already noticed, no subsequent act on the part of the purchaser can affect the rights of the nominee, if the presumption in favor of advancement has once arisen, yet a clear devise to another of the estate will raise a case of election against the nominee. (e)

And where the father of a family has allowed money of his own to be invested in the purchase of an estate, along with other moneys subject to the trusts of his marriage settlement, it will require very strong evidence of intention to show that he did not intend it as an advancement. (f)

\*A purchase in the name of a child, or, it is conceived, a wife, whether solely or jointly with the purchaser, is not within the 27 Eliz.; and it seems to be the better opinion that, except in cases of actual fraud, such a purchase is not within the 13 Eliz. (g)

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By what subsequent acts or circumstances.

Election.

[\*441]

Purchases in name of child or wife not within the 27th or 13th Eliz.; see 13th Eliz.

(x) *Grey v. Grey*, 2 Sw. 600.

(y) *Redington v. Redington*, 3 Ridg. P. C. 106, see p. 191.

(z) *Lamplugh v. Lamplugh*, 1 P. Wms. 111.

(a) See 2 Beav. 455; *Seawin v. Seawin*, 1 Y. & C. C. C. 65.

(b) See *Elliot v. Elliot*, 2 Ch. Ca. 231; *Grey v. Grey*, 2 Sw. 600; and see 2 Beav. 456.

(c) *Sidmouth v. Sidmouth*, 2 Beav. see p. 456.

(d) *Mumma v. Mumma*, 2 Vern. 19.

(e) *Dummer v. Pitcher*, 5 Sim. 35; 2 Myl. & K. 262.

(f) *Ouseley v. Anstruther*, 10 Beav. 462.

(g) Sug. 916, 917.

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On purchase in name of stranger, resulting trust may be rebutted by parol evidence.

Land purchased with trust money becomes impressed with trust.

As to proof of application of money.

And even upon a purchase in the name of a stranger, clear parol or other evidence is admissible to rebut the presumption in favor of a resulting trust; and to show that, either as respects the whole or part of the land, or the interest therein, the purchaser intended the nominee to take beneficially.<sup>(h)</sup>

Where trustees for the purchase of land, lay out the trust moneys and take the conveyance in their own names, the *cestuis que trust*, in order specifically to claim the lands must, of course, prove that they were purchased with the trust moneys; this may be proved either by direct evidence, as where trust money was paid to a trustee by a cheque, which was next day paid over by him in part payment for the estate,<sup>(i)</sup> or by mere parol evidence of declarations by the trustees; but these, in the absence of corroborating circumstances, will be received with great caution.<sup>(k)</sup> The presumption, however, is, that a purchase made by a trustee, whose duty is so to invest trust money, has been made in execution of the trust.<sup>(l)</sup> And where a trustee paid in trust moneys, (applicable to be invested in the purchase of real estate,) and moneys of his own to his general account at his bankers', and then bought real estate, and paid for it by a cheque on his bankers, the court held that such payment was made out of that part of the moneys standing to the general account, which it was proper so to apply; i. e., the trust moneys.<sup>(m)</sup>[1]

[\*442]

(h) See *Maddison v. Andrew*, 1 Ves. S. 57, 61; *Lloyd v. Spillet*, 2 Atk. 148; *Lane v. Dighton*, Amb. 409; *Benbow v. Townsend*, 1 Myl. & K. 506, 510.

(i) *Price v. Blakemore*, 6 Beav. 507.

(k) Sug. 919.

(l) *Ibid.*; *Trench v. Harrison*, 17 Sim. 111.

(m) *Manningford v. Toleman*, 1 Coll. 670, see p. 674.

[1] If a trustee or executor purchases estates with his trust money or assets, and take the conveyance in his own name, without the trust appearing on the face of the deeds, the estates will not be liable to the trusts, although he die insolvent, unless the application of the purchase-money can be clearly proved. And the same principle applies to a purchase by a husband with trust money belonging to his wife of which he may have obtained possession from the trustee, whether with or without the wife's consent; or to a purchase by an agent or steward, with moneys remitted

And where trust moneys are, in breach of trust, invested in the purchase of real estate, the *cestuis que trust* have the option of proceeding either for the money or the estate; or for a proportionate part of the estate, if the trust fund formed only a part of the consideration money.<sup>(n)</sup>

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If purchase be a breach of trust *cestuis que trust* can claim money or land.

(n) See *Att.-Gen. v. Corporation of Newcastle*, 5 Beav. 307; 12 Cl. & Fin. 402. As to when a purchase is considered to be in performance of a covenant to settle land, see Sug. 920, and cases cited; and also the late case of *Ex parte Poole re Symes*, 11 Jur. 1005. As to merger of charges, as between the real and personal representatives of the incumbrancer, on his purchasing the estates, see *Hood v. Phillips*, 3 Beav. 513.

him by his principal. See *Methodist Epis. Church v. Jaques*, 1 John. Ch. Rep. 450. In the old cases, courts of equity were much more strict in the proof they admitted of the application of the money than they now are; but it was always very clear, that upon sufficient proof of the trust money having been laid out in the purchase of the estate, a trust would result and be decreed accordingly. See *Wallace v. Duffield*, 2 Serg. & Rawle Rep. 527. Parol evidence is, in these cases, admissible, either in the life time, or after the decease of the trustee; but unless there are corroborating circumstances, as a writing under the trustee's hand stating the application of the money, or the inability of the trustee to make the purchase with other funds, mere parol evidence of declarations supposed to be made by the purchaser, will be received with great caution. See *Botsford v. Burr*, 2 John. Ch. Rep. 412; 2 Serg. & Rawle, 527. Where a trustee or agent is bound by the trust to lay out the money in land, if he lay it out accordingly, it will be presumed to have been done in execution of the trust. And where an executor of a mortgagee for a term of years purchased the equity of redemption in fee, for a small sum, in his own name, and for his own benefit, he was held to be a trustee of the fee for the benefit of his testator's estate. But if a trustee has considered himself entitled to the trust money for his own benefit, no presumption can be raised, in opposition to this fact, that he intended any lands he may have bought with the trust money to be subject to the trust. A man on his marriage, contracted to assure all such personal estate as he should, during the joint lives of him and his wife be possessed of upon certain trusts. He purchased a real estate, for which he paid partly out of his own monies, and partly out of monies borrowed on his personal security. It was insisted that the real estate was bound by the trusts; but Lord Eldon determined that it belonged to the heir, but charged for the benefit of the persons claiming under the trust, with the purchase-money paid by the husband out of his own funds, and lasting improvements on the estate; and also with the money borrowed which he, in his life time, paid off out of his personal estate, and the estate was held the primary fund for payment of the money borrowed. In this case, it will be seen that the application of the settled fund was clearly traced for all the husband's personal estate, was bound by the settlement; and the only question was, whether the *cestui que trust* should have the estate, or the trust fund laid out in the purchase by it. See *Gibson v. Cooke*, 1 Met. Rep. 75.

## CHAPTER XVII

### REMEDIES AT LAW FOR BREACH OF CONTRACT.

1. *Purchaser's remedies against vendor.*
2. *Vendor's remedies against purchaser.*
3. *Plaintiff how far bound to perform his part of agreement before the action.*
4. *As to the agreement—how far affected by parol evidence.*
5. *Production of, when compelled.*
6. *Grounds of defence—the agreement being admitted.*
7. *Action, when restrained in equity.*
8. *General matters relating to the action.*

(1.) WE have, in the preceding pages, discussed those matters which have appeared most naturally to present themselves for consideration, in cases where an ordinary contract between vendor and purchaser is perfected in the usual way by conveyance of the estate and payment of the purchase-money; without the course of events being disturbed by litigation, either actual or threatened, between the parties. It remains to consider the respective rights and liabilities of the parties, and their representatives, in cases where either party disputes the validity of the contract, or, on other grounds, refuses, neglects, or is unable to perform it; and how such rights and liabilities are varied by the circumstance of the sale being made under a decree or order of a court of equity.

Vendor in default, purchaser's right of action.  
[444]

Where there is default on the part of the vendor, the purchaser, as a general rule, may either rescind the contract and sue for the deposit, as for money had and received; or may affirm the contract, and sue for damages upon the ground of its non-performance; (a) adding the common money count in respect of the deposit (if any has

(a) See *Moses v. Macferlan*, 2 Burr. 1011, and *Dutch v. Warren*, there cited; *Farrer v. Nightingal*, 2 Esp. 639; *Squire v. Tob*, 1 Camp. 293.

been paid;) but he cannot, it seems, rescind the contract if the parties cannot be put *in statu quo* ;[1] as where, upon an agreement for a lease, the intended lessee has been in possession and enjoyed part of the term.(b)[2]

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Where the contract, not being under seal, has been entered into by an agent, the principal may sue upon it in his own name;(c) unless the agent be specially described or referred to in the contract, in terms inconsistent with the idea of agency;(d) so, also, a purchaser who has paid the deposit through an agent, can sue for it in his own name, although the fact of the agency were undisclosed;(e) and, upon similar principles, it has been held that a non-

Agents may sue and be sued, when.

(b) See *Hunt v. Silk*, 5 East, 449; and a like decision has been recently come to where possession had been taken under a contract for sale of the fee simple: *Blackburn v. Smith*, 2 Exch. R. 783; but see, *contra*, on the special wording of the agreement, *Wright v. Colls*, 13 Jur. 1056, C. P.; but mere depreciation of the property is no defence, if the purchaser has not had possession: *Wilkinson v. Lloyd*, 7 Q. B. 27.

(c) See 5 M. & Sel. 388, 391; *Higgins v. Senior*, 8 Mee. & W. see 844; *Humphrey v. Lucas*, 2 Car. & K. 152.

(d) See *Humble v. Hunter*, 12 Q. B. 310, where the agent was described as "owner."

(e) *Duke of Norfolk v. Wothly*, 1 Camp. 337.

[1] For if it be rescinded at all, it must be rescinded *in toto*.

[2] The right to disaffirm the agreement is in some cases of great importance. If an agent enter into an agreement on behalf of his principal, but on the face of the agreement, the agent appears to be the real purchaser, and is so considered by the vendor, yet if the purchaser actually pay the deposit, although through the medium of his agent, and the vendor do not complete his engagement, so that the contract is rescindable, the purchaser himself may maintain an action for recovery of the deposit, which will be considered as money received by the vendor to the use of the real purchaser. But if a man enter into a contract expressly *as agent for a third person*, although really for his own benefit, and the other party has no notice that the supposed agent is the principal, the latter cannot maintain an action upon the contract without first disclosing to the other party that he is the principal. Although the contract is under seal, and the purchaser might for a breach of the contract maintain an action of covenant, yet he may also, if he have a right to rescind the contract, bring an action for money had and received, to recover back his purchase-money. See 1 Sug. on Ven. p. 367; *Weaver v. Bentley*, 1 Caines' Rep. 47; *Gillett v. Maynard*, 5 Johns. Rep. 85, and note a, p. 88 where the principal authorities are collected; *Nelson v. Carrington*, 4 Munf. Rep. 332; *Abbott v. Allen*, 2 Johns. Ch. Rep. 519; *Dorsey v. Jackman*, 1 Serg. & Rawle, 42; *Howes v. Barker*, 3 Johns. Rep. 516; *O'Harra v. Hall*, 4 Dall. Rep. 340; 1 Serg. & Rawle, 51.

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inal agent cannot sue, without first disclosing that he is, in fact, the principal ;(*f*) where an agent contracts apparently on his own account, an action on the contract may be brought against either him or his principal ;(*g*) and if the contract be under seal, the agent, although described as such, appears to be personally liable ;(*h*)[1] but if it be not under \*seal, the agent, describing himself as such, and naming his principal, is not personally liable unless he had no authority to make the contract, or in making it exceeded his authority ;(*i*) and even if a person, without authority, contract in the name of and as agent for another, it appears that he cannot be sued on the agreement, unless he be shown to have been really the principal ; although he may probably be liable in an action for damages for the misrepresentation. (*k*) Where money has been properly received by an agent, the action to recover it must be brought against the principal ;(*l*) but a sum paid to an agent under protest, in respect of a wrongful claim may, it appears, be recovered from the agent. (*m*)

What purchaser can recover in action after rescinding contract.

In an action for money had and received, rescinding the contract, interest upon the deposit may, under a late act, be recovered from such time as demand of payment was made in writing giving notice to the vendor that interest

(*f*) *Bickerton v. Burrell*, 5 M. & Sel. 383 ; but see the remarks of the court in *Rayner v. Grote*, 15 Mee. & W. 366.

(*g*) *Higgins v. Senior*, 8 Mee. & W. 844 ; *Jones v. Littledale*, 6 Ad. & E. 486.

(*h*) *Appleton v. Binks*, 5 East, 148.

(*i*) *Downman v. Jones*, 9 Jur. 454, Exch. Ch.

(*k*) *Jenkins v. Hutchinson*, 13 Jur. 763 ; 18 L. J. 274, Q. B.

(*l*) *Duke of Norfolk v. Worthy*, 1 Camp. 337, and *Edden v. Read*, 3 Camp. 339 ; *Bamford v. Shuttleworth*, 11 Ad. & E. 926 ; *Hurley v. Baker*, 16 Mee. & W. 26 ; but, as we have seen (*supra* 82) an auctioneer is liable to be sued for the deposit ; his character being rather that of stakeholder than of a mere agent of the vendor.

(*m*) *Smith v. Sleep*, 12 Mee. & W. 585.

[1] See *Tippets v. Walker*, 4 Mass. Rep. 595 ; *Douval v. Craig et al.* 2 Wheat. Rep. 45 ; *Thatcher v. Dinsmore*, 5 Mass. Rep. 299 ; *Forster v. Fuller*, 6 Mass. Rep. 58 ; *Summer v. Williams*, 8 Mass. Rep. 162 ; *Thayer v. Wendall*, 1 Gallis. 37 ; *White v. Skinner*, 13 Johns. Rep. 307.

would be claimed from the date of the demand until payment;(n) but it does not appear to be otherwise recoverable.(o). Of course, the purchaser can make no claim in respect of any increase in the value of the estate; and it would seem, upon principle, to be equally clear that he cannot be prejudiced by any diminution of its value; although some old authorities leave the point doubtful.(p)

In an action for damages, affirming the contract, the purchaser, if the contract be proved to have been binding \*upon the vendor, can, (under special counts,) recover his expenses of investigating the title,(q) of searching for incumbrances, and comparing the abstract with the deeds,(r) of preparing the conveyance, (if the sale go off by reason of a concealed incumbrance),(s) and interest upon his deposit,(t) and upon the residue of his purchase-money, if lying idle;(u) and he may recover the deposit itself under a common money count: nor will a court of equity, pending a suit by the vendor for specific performance, grant an injunction to restrain an action for the deposit,(w) unless the vendor consent to its coming into court;(x) but he cannot recover expenses incurred prior to the contract, or the costs of a survey,(y) or of preparing a conveyance,(z) (except under special circumstances,) or any allowance for loss by selling out of the funds,(a) or for money laid

What he can recover in action for damages founded on contract.

[\*446]

(n) See 3 and 4 Will. IV. c. 42, s. 28.

(o) *Fruhling v. Schroeder*, 2 Bing. N. C. 77.

(p) See Sug. 256.

(q) Including costs due, but not actually paid to his solicitor, *Richardson v. Chasen*, 10 Q. B. 756; and a letter from the purchaser's solicitor to the vendor's solicitor stating that unless certain evidence is supplied, and which is not supplied, the purchase must go off, does not affect the right to recover such expenses; *Hall v. Betty*, 5 Scott, N. R. 508.

(r) *Hodges v. Lord Litchfield*, 1 Bing. N. S. 492.

(s) Sug. 427.

(t) *Hodges v. Lord Litchfield*, *ubi supra*.

(u) *Sherry v. Oke*, 3 Dowl. P. 349, 361.

(w) *Tanner v. Smith*, 4 Jur. 310.

(x) *S. C. Annesley v. Muggridge*, 1 Madd. 593.

(y) *Hodges v. Lord Litchfield*, *ubi supra*.

(z) S. C.

(a) *Flureau v. Thornhill*, 2 W. Bla. 1078.

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out in repairs (b) or improvements, (c) or the difference between his costs taxed as between party and party and his costs as between solicitor and client, in an unsuccessful suit by the vendor for specific performance, (d) or the costs of a suit by himself (the purchaser) for specific performance when the bill is dismissed without costs on the master reporting against the title. (e) [1]

[\*447]

No damages for loss of bargain, unless under special circumstances.

\*As a general rule, a purchaser is only entitled to nominal damages for the loss of his bargain, where the vendor, through want of title or otherwise, (f) is *bona fide* (g) unable to convey the estate; (h) and where a purchaser, upon the delivery of an abstract showing an apparently good title, resold at a profit, and it subsequently appeared, on comparing the abstract with the deeds, that the title was defective, he was not allowed the expenses of the resale; there being nothing more on the part of the vendor than negligence in the preparation of the abstract, and

(b) *Brett v. Ellis*, Sug. Append. No. 4.

(c) *Worthington v. Warrington*, 18 L. J., N. S., C. P. 350.

(d) *Hodges v. Lord Litchfield*, *ubi supra*.

(e) *Malden v. Fyson*, 11 Q. B. 292.

(f) See *Tyrer v. King*, 2 Car. & K. 149; a case of a sale by an agent after the estate had been sold by his principal.

(g) See 10 B. C. 416, 421.

(h) *Flureau v. Thornhill*, *ubi supra*; and see *Clare v. Maynard*, 6 Ad. & E. 519.

[1] Where a vendee brings an action on account of the agreement not having been completed, he will be compelled to give the vendor a particular of every matter of fact which he means to rely upon at the trial, as having been a cause of his not being able to complete the purchase; but he is not bound to state in his particular any of the objections in point of law, arising upon the abstract. But although the purchaser assign, by way of special damage, that he has incurred certain expenses, yet he will not be compelled to furnish particulars of such special damage. Where in a single court there were several allegations of damage, the vendor, the defendant, was not allowed to select some of the items and pay the money into court; the whole count, taken together, was in substance of a demand of unliquidated damages. As the seller had broken his contract with the plaintiff, the court would help him to pare down the demand, so as to compel the plaintiff to go to trial at his own risk. Where no particular has been obtained, the plaintiff is not confined to the objections which he may have stated to the defendant, but may take advantage of any other which may entitle him to recover, as for breach of the agreement. See 1 Sug. on Vend. p. 269, and cases cited.



the purchaser himself being equally negligent in re-selling before he had tested its accuracy.<sup>(i)</sup> If, however, there be actual *mala fides* (*k*) on the part of the vendor, or (it would appear,) if he sell the estate under the *knowledge* that he is not in a position to insure a title, the case may be different; *e. g.*, where A. having a mere agreement for the purchase of an estate, sold it to B., who resold it at a profit to C., and then the whole matter went off through a want of title in the original vendor, it was held that B.'s claim was not to be restricted to nominal damages;<sup>(l)</sup> it does not, however, appear upon what principle the damages were assessed.<sup>(m)</sup>[1]

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Upon the death of the purchaser, the right to sue in respect of any damages which may have been sustained by his personal estate,—*e. g.*, loss of interest on the deposit, or the expenses of investigating the title,—descends upon his personal representative;<sup>(n)</sup> and no action upon the \*agreement can be brought by the heir:<sup>(o)</sup>[2] but his only resource is a suit in equity.

Death of purchaser, right of action goes to personal representatives.

[\*448]

Upon the death of the vendor, his personal representatives alone are liable to an action at law, if, as is usually the case, the agreement is not under seal.

Death of vendor, purchaser's right of action against his representatives.

(i) *Walker v. Moore*, 10 B. & C. 416.

(k) *S. C.*

(l) *Hopkins v. Grazebrook*, 6 B. & C. 31; *Robinson v. Harman*, 1 Exch. 850; but see *Brett v. Ellis*, Sug. Appnd. No. 4.

(m) See 10 B. & C. 420; and see *Worthington v. Warrington*, 18 L. J., N. S., C. P. 350.

(n) *Orme v. Broughton*, 10 Bing. 533.

(o) Sug. 259.

[1] If the vendor fail to convey according to his contract, the measure of damages is the value of the land at the time of the breach, and not the price fixed in the contract. *Hopkins v. Lee*, 6 Wheat. Rep. 109. But see *Baldwin v. Mann*, 2 Wend. Rep. 407, where it is doubted. If a party has paid the contract price, and then institutes his action to recover his damages for the breach of the contract, the defendant would only be answerable for the loss or damage naturally resulting from the breach of contract complained of, and not for any collateral loss or damage. 8 Wend. Rep. 435; 3 Wheat. 546; 5 Wheat. 385; 6 Wheat. 109; 12 Conn. Rep. 133; 3 Pet. Rep. 69.

[2] For in such a case, there is a personal contract, a breach of it in the life time of the purchaser, and a loss to the personal estate.

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Right of action in vendor or his representatives, against purchaser or his representatives, for breach of contract.

(2.) *Vendor's remedies at law against purchaser.*

Upon default by the purchaser, the vendor, or, if he be dead, his personal representatives, can sue the purchaser, or, if he be dead, his personal representatives, or his real representatives, if the agreement were under seal, and the heirs were named therein, for damages sustained by the breach of the contract.<sup>(p)</sup>

Vendor cannot recover entire purchase-money, if no conveyance.

Where a purchaser has been let into possession, and refuses to complete, the vendor cannot, if no conveyance has been executed, recover from him the whole amount of the purchase-money, but only the damages actually sustained by the breach of contract;<sup>(q)</sup>[3] this right of action is not taken away by a stipulation that if the purchaser shall fail to comply with any of the conditions the deposit shall be forfeited as liquidated damage.<sup>(r)</sup>

Purchaser in possession, whether liable for use and occupation if no title.

If the purchase go off through defect of title in the vendor, the purchaser, if he have been let into possession, cannot be sued for use and occupation for the time during which the contract was pending, although the occupation have been a beneficial one;<sup>(s)</sup>[4] in the two principal re-

(p) *Vide supra*, p. 376, as to the liability of the heir and devisees upon the covenant.

(q) See *Laird v. Pim*, 7 M. & W. 474.

(r) *Icely v. Grew*, 6 Nev. & M. 467.

(s) *Kirtland v. Pounsett*, 2 Taunt. 145; *Winterbottom v. Ingham*, 7 Q. B. R. 611.

[3] But the vendor cannot maintain an action against the vendee, for a breach of the contract of sale, until, on a re-sale, the deficit shall have been ascertained. *Webster v. Hoban*, 7 Cranch Rep. 399.

[4] Where a purchaser is let into possession on a treaty for purchase, he does not become tenant to the seller; and if the seller cannot make a title it is doubtful whether an action will, under any circumstances, lie against the purchaser. It is settled that the action will not lie where the occupation has not been beneficial to him, beyond the mere protection from the inclemency of the weather, and if he paid the money, of which the seller might have made interest, although the jury expressly find that the value of the house during the occupation of the purchaser, exceeds the interest of the money paid, yet the seller cannot recover; for it is impossible to make the rules of law depend on the balance of loss or gain in each transaction; one party must take back his money, and the other take back his house. A contract cannot arise by implication of law, under circumstances, the occurrence of which neither of the parties ever had in their contemplation. See 1 Sug. on Vend. p. 276, and cases.

ported cases it appears that the purchaser had paid, in one case all, and in the other part, of the purchase-money; \*but although this was in some degree relied on in the earlier, it does not seem to have been considered material in the later, of the two decisions; but if, after the contract is clearly abandoned, he retain possession, he will be liable in respect of such subsequent occupation.(t) But the purchaser when let into possession, (unless under an agreement to quit in some specified event which has happened,)(u) cannot be ejected without notice.(w)[1]

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[\*449]

(3.) *Plaintiff how far bound to perform his part of the agreement before action.*

As a general rule, the mutual engagements of the parties will be considered dependent on each other; and either must, (unless discharged therefrom by the other,)(x) perform his liabilities before he seeks to enforce his rights under the contract. So that, on the one hand, the purchaser cannot sue upon the agreement without tendering the conveyance,(y) and the sum, (if any,) due in respect of the purchase-money and interest;(z)—(unless the vendor have neglected to furnish or verify(a) his abstract of title, or have shown a bad title,(b) or, by conveying away

Performance of contract on part of plaintiff how far necessary to support action.

(t) *Howard v. Shaw*, 8 Mee. & W. 118.

(u) *Doe v. Sayer*, 3 Camp. 8.

(w) See 1 M. & W. 700; *Right v. Beard*, 13 East, 210; and see *Doe v. Caperton*, 9 Car. & P. 112; *Doe v. Chamberlaine*, 5 Mee. & W. 14.

(z) See *Jones v. Barkley*, Doug. 659; *Laird v. Pim*, 7 Mee. & W. 474; if the agreement is by deed, the discharge must also be under seal; see 19 L. J., N. S., Exch. Ch. 328.

(y) See *Knight v. Crockford*, 1 Esp. 190.

(x) Sug. 375.

(a) See *Berry v. Young*, 2 Esp. 640, n.

(b) See *Seaward v. Willock*, 5 East, 202.

[1] But as the possession is in these cases lawful, being with the assent of the seller, an ejectment will not lie against the purchaser without a demand of possession, and refusal to quit; unless upon possession being given to him, he agreed to quit possession if he should not pay the purchase-money on a given day, or the like; in which case an ejectment will lie without notice, on non-performance of his agreement. The agreement operates in the same manner as a clause of re-entry, on breach of covenant in a lease,

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the estate(c) or otherwise,(d) have disabled himself from completing the contract :)—and, on the other hand, it has been held that the vendor, if he sue merely upon the \*agreement and not upon some security which he has taken for the purchase-money,(e) must have executed, or offered to execute,(f) or, according to a modern decision,(g) have been ready and willing to execute a conveyance in the terms of the contract ; the rule, in the absence of stipulation, being, that the purchaser must prepare and tender the conveyance.[1]

But, of course, the contract may be so worded as to show that the mutual stipulations were, to a certain extent, independent ; it being a general rule, that if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be

(c) *Lovelock v. Franklyn*, 8 Q. B. R. 371; *Knight v. Crockford*, 1 Esp. 190.

(d) See *Caines v. Smith*, 15 M. & W. 189; *Short v. Stone*, 3 Dow. & L. 580; *S. C.*, 8 Q. B. 358.

(e) See *Moggridge v. Jones*, 14 East, 486; *Spiller v. Westlake*, 2 B. & Ad. 155.

(f) *Phillips v. Fielding*, 2 H. Bl. 123; *Laird v. Pim*, 7 M. & W. 474.

(g) *Poole v. Hill*, 6 M. & W. 835, 841; and see *Chitty on Contracts*, last ed. 273, and *Thames Haven Company v. Brymer*, 19 L. J., N. S., Exch. Ch. 321; but see Sug. 261, where *Poole v. Hill* is not cited.

[1] In this country, the party who is to give the deed, has the same drawn at his own expense; but under a covenant to convey, he is not bound to prepare the conveyance, until the party who is to receive it, is in a situation rightfully to demand. And after such demand the grantor is allowed a reasonable time for drawing and executing it; and he is then to hold it ready for delivery when called for, and is in no default until a second demand is made. The purchaser nevertheless, may prepare the deed, and tender it for execution—and then only one demand is necessary. *Fuller v. Hubbard*, 6 Cowen, 1; *Connelly v. Pierce*, 7 Wend. Rep. 129; *Wells v. Smith*, 2 Edw. Ch. Rep. 78. Where the vendor covenanted, that upon payment of the purchase-money, he would give a title to the purchaser; held that he was bound to prepare and tender the deed of conveyance. But if the purchaser deny having made the purchase without other objection, this was held to dispense with a tender of the deed, for it would be a nugatory act for the vendor to tender a deed, which the purchaser told him he would not accept. *Sweitzer v. Hummel*, 3 Serg. & Rawle Rep. 228; *Hampton v. Spochenagle*, 9 Serg. & Rawle, 212.

brought for the money, or for not doing such other act, before performance: for it appears that the party relied on his remedy, and did not intend to make the performance a condition precedent: (h) for instance, where a vendor agreed that he would, within one month from the date of the contract, or from being required so to do, deliver an abstract of title and deduce a clear title, and the purchaser agreed to pay part of the purchase-money down, and the residue on or before four years after date, with interest payable half-yearly on certain fixed days, it was held, that the vendor could sue for interest which had become due, although no abstract might have been delivered.

(i)[2]

\*And an actual refusal by the vendor to execute the conveyance, has been held to be no defence at law to an ac-

[\*451]  
Refusal by  
vendor to  
convey, no

(h) *Portage v. Cole*, 1 Wms. Saund. 320 b, n.; see 6 C. B. 114; *Maitlock v. Kinglake*, 2 Per. & Dav. 343; *Porcher v. Gardner*, 14 Jur. 43; and *Thames Haven Company v. Brymer*, 19 L. J., N. S., Exch. Ch. 321, 328.

(i) *Dicker v. Jackson*, 6 C. B. 103, 114; and see *Sibthorp v. Brunel*, 3 Exch. 826; and, in equity, *Lloyd v. Lloyd*, 2 Myl. & Cr. 192.

[2] In agreements for purchase, the covenants are construed according to the intent of the parties, and they are therefore always considered dependent, where a contrary intention does not appear. The true rule is that it is not the employment of any particular word which determines a condition to be precedent, but the manifest intention of the parties. The old law is said to have been in favor of the contrary doctrine. But it has been well said, that if the courts were to hold otherwise than they now do, the greatest injustice might be done; for supposing, in the instance of a trader who had entered into a contract for the sale of an estate, that between the making of the contract, and the final execution of it, he were to become a bankrupt, the vendee might be in the situation of having had payment enforced from him, and yet be disabled from procuring the property for which he had paid. If therefore, either a vendor, or vendee, wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. See *Quackenboss v. Lansing*, 6 Johns. Rep. 49; *Barruso v. Madan*, 2 Johns. Rep. 142; 10 Johns. Rep. 204; *Obermyer v. Nichols*, 6 Binn. 159; *Bennet v. Pizley*, 7 Johns. Rep. 249; *M. Millan v. Vanderkip*, 12 Johns. Rep. 165; *Jennings v. Camp*, 13 Johns. Rep. 94; *Green v. Reynolds*, 2 Johns. Rep. 207; *Jones v. Gardner*, 10 Johns. Rep. 266; *Galcy v. Price*, 16 Johns. Rep. 267; *Hardin v. Krelsinger*, 17 Johns. Rep. 293; *Robb v. Montgomery*, 20 Johns. Rep. 15; *Ramsay v. Brailsford*, 2 Des. 582; *Porter v. Rose*, 12 Johns. Rep. 209.

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defence to  
action on  
note for secu-  
ring purch-  
ase-mo-  
ney.

tion by him upon a note or other security given by the purchaser for the purchase-money.(j) It seems to be the better opinion, that, even where there is no condition respecting the forfeiture of the deposit, and the purchaser by his own default loses his right to enforce the contract, he has no right to recover his deposit, and will not acquire such right by reason of the estate being subsequently sold by the vendor.(k)

(4.) *As to the agreement ;—how affected by parol evidence.*

What is a  
sufficient  
contract  
within the  
Statute of  
Frauds.

We have already considered(l) what is a sufficient agreement within the Statute of Frauds: we may here remark, that the doctrine acted upon in courts of equity as to parol agreements being taken out of the statute by part performance, is not recognized by a court of law. (m)[1]

(j) *Moggridge v. Jones*, 14 East, 486; but see the remarks of Parke, J. in *Spiller v. Westlake*, 2 B. & Ad. 155, 157.

(k) See Sug. 41; but see *Palmer v. Temple*, 1 Per. & Dav. 379.

(l) *Supra*, Ch. VII.

(m) Sug. 140.

[1] The same general rule prevails in equity, as at law, that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments, and that the interpretation of them must depend upon their own terms. But in cases of accident, mistake, or fraud, courts of equity are constantly in the habit of admitting parol evidence to qualify and correct, and even to defeat, the terms of written instruments. So they will allow parol evidence to re-but a presumption, or an equity arising out of written instruments. But in these latter cases, they do not interfere with, or repel the proper construction of the instrument itself, but only the artificial rules of presumption, or of equity which they themselves have created or applied, to cases perfectly indeterminate in their nature and admitting of either construction, according to the real intent of the party. 2 Story's Eq. Juris. sec. 1531.

The general rule is, that parol evidence cannot be admitted to contradict, explain, or alter a written agreement: but may be received to prove fraud, mistake, usury, or surprise in the execution of it. *M' Mahon v. Spangler*, 4 Rand. 51; *Pooser v. Tyler*, 1 McCord's Ch. Rep. 18; *Gibson v. Watts*, 1 McCord's Ch. Rep. 490; *Holmes v. Simons*, 3 Desau. 149; *Lloyd v. Ex'rs. of Inglis*, 1 Desau. 333; *Anderson's ex'r. v. Bacon*, 1 A. K. Marsh. 50; *Fiskback v. Woodford*, 1 J. J. Marsh. 86; *Love v. Cofer*, 1 J. J. Marsh. 327; *Williams v. Beazley*, 4 J. J. Marsh. 580; *Thompson v. Patton*, 5 Litt. 74; *Dwight v. Pomeroy*, 17 Mass. Rep. 303; *Bradbury v.*

The contract, as originally entered into, cannot, at law, Chap. XVII.

No parol  
variation of

*White*, 4 Greenl. 391; *Meads v. Lansingh*, Hopkins, 124; *Wesley v. Thomas*, 6 Har. & Johns. 24; *Watkins v. Stockett's adm'r.*, 6 Har. & Johns. 435; *Randall v. Phillips*, 3 Mason, 378; *Dickenson v. Dickenson*, 2 Murphy, 279; *Lemaster v. Burckhart*, 2 Bibb, 28; *Baugh v. Ramsey*, 4 Monroe, 158; *Huston's ex'r. v. Noble*, 4 J. J. Marsh. 134; *Fenwick v. Ralliff*, 6 Monroe, 154. Where there is no latent ambiguity, but plain contradictory bequests, parol evidence of the testator's intention is inadmissible. *Field v. Eaton*, 1 Dev. Eq. 283. Parol evidence is inadmissible to prove that the intention of the testator was not properly expressed in the will; or that he used words the meaning of which he did not understand. *Reeves v. Reeves*, 1 Dev. Eq. 386. Parol evidence is sometimes admitted on the part of a defendant to show a mistake in a deed, to prevent the specific execution of it, but never on the part of the complainant to set up a different deed from that which has been executed. *Westbrook v. Harbeson*, 2 McCord's Ch. Rep. 115. The existence of a resulting trust may be proved by parol evidence in opposition to the face of the deed, and to the answer of the trustee; but to establish the trust under those circumstances, the earliest and the strongest testimony must be produced. *Jenison v. Graves*, 2 Blackf. 440; *Elliott v. Armstrong*, 2 Blackf. 198. Parol evidence of the practical construction given to a deed by the parties thereto, is admissible when the language thereof—especially in the description of the land conveyed—is doubtful. *Stone v. Clark*, 1 Met. Rep. 378. Parol evidence is admissible to show that a deed or bill of sale, absolute on its face, was intended as a mortgage, or that it was executed and delivered upon certain trusts, not reduced to writing, and upon the proof being made a court of equity, will decree their execution. *R. Bishop's heirs v. The adm'r. and heirs of S. Bishop*, 13 Ala. Rep. 475. Although parol evidence is inadmissible to add to, or explain a deed, yet, if a conveyance, purporting to be voluntary, is impeached for fraud, it is competent to the party claiming under it to show that, in fact, it was made upon a valuable consideration. Its being voluntary does not render it void, but is merely evidence of a fraudulent intent; and, any evidence is admissible which shows that no such intent existed. *Henderson v. Dodd*, Bailey's Eq. Rep. 138. Where a party uses technical language in a deed or other instrument, the law presumes he intended it in a technical sense, to be understood and used, and parol testimony is inadmissible to explain, control or vary the legal effect of such deed, or other instrument. *Ryan v. Goodwyn*, McMullan's Eq. Rep. 451. The receipt in a deed is not conclusive, and where an actual question is raised as to the payment of the consideration, parol evidence may be resorted to, to show by whom it was advanced. *Depeyster v. Gould*, 2 Green's Ch. Rep. 474. The obligor of a bond will not be admitted to prove by parol, that, at the time of giving the bond, it was agreed that the obligee should look to another source for payment, and that the obligor should not be personally liable. *Chetwood v. Brittan*, 1 Green's Ch. Rep. 438; S. P. 3 Green's Ch. Rep. 334. Whatever the contracting parties reduce to writing, must be considered as embodying their understanding at the time. If, by fraud, or mistake or accident, the paper should not contain the true agreement, or the whole agreement, it may be supplied by

be altered by evidence of a parol variation in favor of either plaintiff or defendant.(n)[2]

(n) See *Goss v. Lord Nugent*, 5 B. & Ad. 58; *Henson v. Coope*, 3 Sco. N. R. 48.

parol. Ib. Where a particular word or phrase has a particular or technical meaning in a particular neighborhood, or at a particular period, and that word or phrase is used in an instrument made at that place or time, it is competent to show that meaning by parol. *Broadwell v. Broadwell*, 1 Gilman's Rep. 599. The declarations of a testator, after making his will, of his purpose and intentions therein, are not admissible in evidence to control or explain it. *Weston v. Foster*, 7 Met. Rep. 297. A latent ambiguity arising out of extrinsic facts in the construction of a will, may be explained by facts in and out of the will, and by parol evidence of intention. *Haydon v. Ewing's devisees*, 1 B. Mon. Rep. 111. Where a testator disposed of, by will, a considerable estate, leaving, however, some residuary property, and provided that his debts should be paid from the income of a certain plantation and slaves. Held, that it was inadmissible to receive evidence of the amount of the debts, as compared with the fund provided for paying them, and with the undisposed of property, in order to show that the testator must have intended that the residuary property should be first applied towards paying the debts, and that the fund specially provided for satisfying them should only be used in case the residuary property should be insufficient for that purpose. *Pickney v. Pickney*, 2 Richardson's Eq. Rep. 219. When the complainant alleges his contract to have been for commonwealth's paper, though the written instrument calls for specie, and the defendant in his answer denies it, but sets up a contract variant from the writing and from that alleged by the complainant; parol testimony is admissible to establish the real contract. *Wilson's adm'r. v. Bowen*, 4 J. J. Marsh. 122. The fraud or mistake must be in the execution of the instrument, for parol proof to contradict the terms of it or vary its stipulations. *Fishback v. Woodford*, 1 J. J. Marsh. 87. Parol testimony to show that a deed, in terms an absolute conveyance, was not intended as such, but was designed as a mortgage or other conditional conveyance, is not admissible at law; nor can it be admitted in chancery unless there is an allegation; and some proof that there was fraud or mistake in the execution of the deed, or some vice in the consideration. *Thomas v. McCormick*, 9 Dana, 108. When an answer admits that a deed apparently absolute, was to any extent or for any purpose conditional or in trust, the complainant may show the true condition or trust by parol proof. Ib. The recital in a deed that the consideration was paid, is not conclusive that it was actually paid. Parol evidence may be admitted to show what was paid. Ib. A deed, though absolute on its face, may be shown to be in trust in a court of chancery. *Holmes et al. v. Tront et al.*, McLean's Rep. 7. An instrument of thirty years standing not impeached, need not be proved by subscribing witnesses. Ib. An instrument of writing more than forty years old is not required to be

[2] Previously to the statute of frauds, parol evidence might have been given of collateral and independent facts, which tended to support a deed.



As respects the reception of parol evidence in order to explain agreements of doubtful or ambiguous meaning; Chap. XVII.  
Parol evidence how

proved with the same strictness as one of modern date, unless there are facts and circumstances proved which create doubts as to its genuineness. But if these facts and circumstances are explained and refuted by the evidence, then the instrument must be considered as coming within the rule which does not require strict proof of its execution. *Walton et al. v. Coulson*, McLean's Rep. 120. Where a deed is absolute on its face, or a bond for land is assigned absolutely, but admitted to be security for money only, parol evidence is admissible to show the extent, nature, &c. of the lien of the holder. But it should be clear and satisfactory, if in contradiction to the terms of the writing. *Vanmater v. McFaddin*, 8 B. Mon. Rep. 435. If a devise be of an estate for life, generally parol proof is admissible to show what estate the deviser had in the premises. *Ib.* 600.

The same rule has prevailed since the statute of frauds. The evidence, however, is not offered to contradict or vary the agreement, but to ascertain an independent fact, which is consistent with the deed, and which it is necessary to ascertain, with a view to effectuate the real intention of the parties. It is, however, clearly settled, that parol evidence is not admissible to disannul and substantially vary a written agreement; for, to add anything to an agreement in writing by admitting parol evidence, is not only contrary to the statute of frauds, but to the rule of the common law, before that statute was in being. But after the agreement has been reduced into writing, it is competent to the parties at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or abstract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved, partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. But this refers only to an agreement at common law. *Stephens v. Cooper*, 1 John. Ch. Rep. 425; *Jackson v. Sill*, 11 John. Rep. 201; *Richards v. Killam*, 10 Mass. Rep. 239; *Paine v. McIntier*, 1 Mass. Rep. 69; *Revere v. Leonard*, 1 Mass. Rep. 91; *Storer v. Freeman*, 6 Mass. Rep. 435; *Stockpole v. Arnold*, 11 Mass. Rep. 27; *Dwight v. Pomeroy*, 17 Mass. Rep. 303; *Thompson v. White*, 1 Dall. 426; *O'Harra v. Hall*, 4 Dall. 340; *McDermot v. U. S. Ins. Co.* 3 Serg. & Rawle, 609; *Speake v. U. S.* 9 Cranch, 28; *Pierson v. Hooker*, 3 Johns. Rep. 68; *Howes v. Barker*, 3 Johns. Rep. 506; *Thompson v. Ketchum*, 8 Johns. Rep. 146; *Jackson v. Croy*, 12 Johns. Rep. 427; *Fitzhugh v. Runyon*, 8 Johns. Rep. 292; *Moran v. Hays*, 1 Johns. Ch. Rep. 339; *Stephens v. Cooper*, 1 Johns. Ch. Rep. 425; *Snyder v. Snyder*, 6 Binn. 483; *Lee v. Biddis*, 1 Yeat. 8; *Vandervoort v. Smith*, 2 Caines' Rep. 155; *Hamilton v. Cawood*, 3 Har. & McHen. 437; *Dupree v. McDonald*, 4 Des. 209; *Barrett v. Barrett*, 4 Des. 447; *Sessions v. Barfield*, 2 Bay. 94; *Milling v. Crankfield*, 1 McCord, 261; *S. C. Society v. Johnson*, 1 McCord's Rep. 41; *Little v. Henderson*, 2 Yeat. 295; *Holmes v. Simons*, 3 Des. 149; *Smith v. Fenner*, 1 Gallis. 170; *Treadwell v. Bulkley*, 4 Day, 395; *Dunham v. Baker*, 2 Day, 137; *Jackson v. Bowen*, 1 Caines' Rep. 358; *Ross v. Norvell*, 1 Wash. 14; *Flem-*

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far admissible in explanation of contract.

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the following seems to be the general result of the authorities: the courts will always, if necessary, receive evidence to enable them to decipher, or, if written in a foreign language, to interpret, the instrument; that is, to ascertain what are the expressions, or the English equivalents to \*the expressions, which the parties have actually used: they will also receive parol evidence of the meaning which local custom,<sup>(o)</sup> or professional or trade usage,<sup>(p)</sup> has attached to particular expressions; so as, in fact, to ascertain what is, (with reference to the particular subject-matter of the contract,) their strict and primary meaning;<sup>(q)</sup>—unless such a construction would be inconsistent with the terms of the instrument,<sup>(r)</sup> or some express provision of the Legislature; for instance, local custom cannot vary the statutory meaning of expressions referring to weights and measures;<sup>(s)</sup>—or to annex any customary incidents to the contract which are not express-

(o) *Smith v. Wilson*, 3 B. & Ad. 728; *Doe v. Benson*, 4 B. & Ald. 885, where evidence was admitted to show that by Lady day was meant old Lady day.

(p) *Clayton v. Gregson*, 4 Nev. & M. 602; *Hutchison v. Bowker*, 5 M. & W. 535; and see *Lewis v. Marshall*, 8 Sc. N. R. 477, 493; *Sotilichos v. Kemp*, 3 Exch. 105.

(q) See *Colpoys v. Colpoys*, Jac. 463; *Simpson v. Margilson*, 11 Q. B. 25; *Doe v. Langton*, 2 B. & Ad. 695; *Doe v. Birch*, 1 M. & W. 402; *Parker v. Gossage*, 2 Cr. M. & R. 617.

(r) See 19 L. J., N. S., C. P. 295.

(s) See *Master, &c. of St. Cross v. Lord Howard De Walden*, 6 Durn. & E. 338.

*ings v. Willis*, 2 Call, 5; *Baker v. Glascock's Les.* 1 Hen. & Munf. 177; *Mann v. Mann*, 1 John. Ch. Rep. 231; *Herd v. Bissell*, 1 Root, 260.

The foundation of the rules for rejecting parol evidence, is in the general rules of evidence in which writing stands higher in the scale than parol testimony, and when treaties are reduced into writing, such writing is taken to express the ultimate sense of the parties, and is to speak for itself. Where an agreement is spoken of, the first question always asked is, whether the agreement is in writing; if so, there is an end of all parol evidence; for when the parties express their meaning with solemnity, that is very proper to be taken as their final sense of the agreement. In the case of a contract respecting land, this general idea receives weight from the circumstance that you cannot contract at all on that subject but in writing, and that, therefore, is a further reason for rejecting the parol evidence. In this way only is the statute of frauds material; for the foundation of the objection is in the general rules of evidence.

ly or impliedly excluded by the terms of the written instrument : (t) where construing the expressions according to such strict and primary meaning would render them insensible with reference to extrinsic circumstances, the courts will receive parol evidence of the circumstances and situation of the parties, and the state of the property at the date of the agreement, for the purpose of ascertaining whether such expressions have not been used in some secondary sense consistent with such circumstances, &c. : (u) and where, as respects all or any part of the subject-matter of the contract, (w) or the identity of places, documents, (x) or persons (y) referred to, there is a *latent* ambiguity ; that is, where the words of the agreement, although certain in point of grammatical construction and apparently definite, are rendered of doubtful application by circumstances which appear *aliunde*, (z) or, according to a modern decision, (a) upon the face of the agreement itself, parol evidence of the *intention* of the parties at the date of the agreement is admissible, in order to identify the estate, document, plan, or other thing or person intended ; but such evidence is not admissible in aid of a *patent* ambiguity ; i. e., an ambiguity which is either directly suggested by the terms of the instrument, (b) or is occasioned by the grammatical uncertainty of the expressions therein used.

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Evidence of intention, when admissible.

(5.) *Production of agreement, when compelled.*

If the only executed copy of the agreement is in the

Production

(t) *Hutton v. Warren*, 1 M. & W. 466 ; *Syers v. Jones*, 2 Exch. 111 ; *Spartali v. Benecke*, 19 L. J., N. S., C. P. 293.

(u) See *Eden v. Earl of Bute*, 3 Bro. P. C. 679 ; *Allen v. Cameron*, 1 Cr. & Mee. 832 ; *Simpson v. Henderson*, M. & Malk. 300 ; and *Shore v. Wilson*, 9 Cl. & F. 355.

(w) *Longchamps v. Fawcett*, Peak. Ca. 101 ; *Doe v. Burt*, 1 Durn. & E. 701 ; *Jones v. Newman*, 1 W. Bla. 60.

(x) *Hodges v. Horsfall*, 1 Russ. & Myl. 116.

(y) See *Doe v. Westlake*, 4 B. & Ald. 57.

(z) *Doe v. Morgan*, 1 Cr. & Mee. 235.

(a) *Doe d. Gord v. Needs*, 2 Mee. & W. 129 ; and see *Colpoys v. Colpoys*, Jac. 464.

(b) See *Brodie v. St. Paul*, 1 Ves. jun. 326 ; and see 1 Sch. & Lef. 36. ;

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of contract,  
when or-  
dered.

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hands of a defendant,(c) or of a third party,(d) either party can, as of course, procure an order, before trial, for its previous production for the purpose of inspection and of being stamped; and where the sole uncopied original was surreptitiously obtained from the plaintiff by the defendant who swore that he had lost it, he was ordered to produce a copy for the purpose of being stamped, and was precluded from setting up the unstamped original;(e) but this has been overruled in a very recent case.(f) \*Where two original copies are retained, one by each party, the party who loses his copy, cannot, at law, compel the other party to produce his copy at the trial, or for the purpose of inspection; but is driven to a bill of discovery;(ff)[1]

(c) *Blakey v. Porter*, 1 Taunt. 386; *King v. King*, 4 Taunt. 666; *Hall v. Bainbridge*, 3 Dowl. & L. 92.

(d) *Gigner v. Bayly*, 5 Moore, 71.

(e) *Bousfield v. Godfrey*, 5 Bing. 418; and see, in Equity, *Blair v. Ormond*, 1 De G. & S. 428; *Smith v. Henley*, 1 Phil. 391.

(f) *Rankin v. Hamilton*, 14 Jur. 930.

(ff) See *Street v. Brown*, 6 Taunt. 302.

[1] The Roman law provided similar means, by the oath of the parties, and by a bill of discovery, to obtain due proofs of the material facts in controversy between the parties. Three modes were originally adopted for this purpose. One was upon a due act of summons, to require the party without oath, to make a statement or confession generally relative to a matter in controversy. Another, was to require him to answer before the proper judge, to certain interrogatories, propounded in the form of distinct articles, which the judge might, in his discretion, order him to answer upon oath, as to the fact in controversy; the party applying for the answer consenting to take the answer so given upon oath, as truth. On this account, it was called the decisive, or decisory oath; and it admitted of no countervailing and contradictory evidence. In the two former cases, other proofs were admissible. In the Roman law, bills of discovery was called *actiones ad exhibendum*, when they related to the production of things, or deeds, or documents, in which another person had an interest. When they required the answer of the party on oath, to interrogatories, they are called *actiones interrogatorie*. Originally, interrogatory actions might be propounded at any time before suit brought by any party having any interest. But in the time of Justinian, they had become obsolete, and interrogatories were propounded only in cases in litigation. The Roman law also required that the party seeking a discovery of facts should have a legal capacity to sustain himself in court; and that the discovery should respect some right of action. 2 Story's Eq. Juris. secs. 1486, 1487.

The object of bills of discovery being to assist and promote the ad-

whether a court of law will compel its production for the mere purpose of stamping, seems to be doubtful.(g)[2] Chap. XVII.

“(6.) *Grounds of defence at law, the agreement being admitted.*

Supposing the agreement and its breach to be *prima facie* capable of proof against the defendant, he may, by way of defence to the action, show, either that the agreement was originally invalid, or that it has since its execution ceased to be binding, or that satisfaction has been made for its breach. Grounds of defence to action on contract duly executed.

For instance, he may show that, at the time of the execution of the contract, he was under some personal incapacity to contract;(h)[3] or was under du- Original invalidity of contract;

(g) See *Travis v. Collins*, 2 Cro. & Jer. 625; *Neale v. Swind*, 2 Cro. & Jer. 278. See Mr. Tilsley's remarks, Tils. on S. L. p. 386.

(h) *Supra*, Ch. I.

ministration of public justice they are greatly favored in equity and will be sustained in all cases where some well founded objection does not exist against the exercise of the jurisdiction.

[2] The general rule, at law, seems to be, that unless the party holding the deed, has been, in effect, a trustee for the party requiring the production of it, he cannot call for it.

[3] The contract of an infant, a married woman, an idiot, or lunatic, may in general be avoided, and in some cases, is absolutely void. But an infant may bind himself to pay for necessities, for himself and family, suitable to his situation in life, unless he live with his father or mother, master or mistress, and is maintained by them, in which case, even his contract for necessities, is void. An infant is not bound to pay for articles furnished, more than they were really worth to him as articles of necessity, and consequently he may not be bound to the extent of his contract; nor can he be precluded, by the form of the contract, from inquiring into the real value of the articles furnished. And an express promise to pay for necessities, is not necessary, in order to make him liable. An infant is not liable for breach of promise of marriage; but may maintain an action for breach of promise against another. An infant is liable to pay the debts of his wife, contracted by her before marriage. He can, in no case, bind himself by bill of exchange, promissory note, or settlement of account, even for necessities; neither is he liable for money lent and delivered to him, to pay for necessities, although the money be applied by him, to that purpose. And although he may bring an action for an injury done to, or a contract made with him, yet if he settles such injury, or for the violation of such contract, it shall not bind him. An infant may also bind himself, by a renewal of his promise, on his coming

Chap. XVII. *ress* ;(i)[4] or was fraudulently induced to enter into it ;(k)

(i) Bas. Abr. tit. Duress.

(k) See *Haigh v. De La Cour*, 3 Camp. 319; *Emanuel v. Dane*, *ib.* 299; *Solomon v. Turner*, 1 Stark. 51; *Hutchinson v. Morly*, 7 Scott, 341; *Cornfoote v. Fowke*, 6 Mee. & W. 358; actual fraud in the agent is the same as fraud in the principal, *Doe d' Willis v. Martin*, 4 Durn. E. 39; *Wilson v. Faller*, 3 Q. B. 68.

of age. This must be by a *promise*, for a bare *acknowledgment* of the debt is not sufficient. There should be a promise to a party in interest, or his agent, or at least an explicit admission of an existing liability, from which a promise may be implied. If a person who had promised marriage during non-age, continue his addresses, and the same line of conduct after attaining the age of twenty-one years, as if the engagement still existed, he would probably be held to have ratified his promise, although no subsequent express promise could be proved. It was formerly held, that an idiot or lunatic could not avoid his contract *at law*, upon a maxim which had grown up, without reason, in the opinion of many that *a man shall not be allowed to stultify himself*. The doctrine is now exploded, and he may in all cases defend against his contract, on the ground either of idiocy, or lunacy. A contract made during a lucid interval would, of course be binding; and where a general derangement is shown, it is then incumbent on the one who insists that the act is valid, to show sanity at the very time when it was performed. Weakness of understanding, is not, of itself, any objection in law, to the validity of a contract. If a man has any glimmering of reason, so that he can tell his parents, his age, or the like common matters, he cannot avoid his contracts. But although mere weakness of understanding, is insufficient, yet it furnishes strong ground of suspicion, and is an item in the proof of fraud against which a court of equity will relieve, when it can be collected from the circumstances, and a court of law, where it is clearly established. Though an idiot be not liable on his contract, yet he is answerable in damages, for any wrong he may have committed, the same as any other person. And so of a lunatic. And either of them are thus liable, even after the execution of a commission from chancery, and being ordered into the custody of their committee. A lunatic is moreover liable for debts which he has contracted during lucid intervals, before the commission executed; and either of them may sustain injuries, or have debts due to them, the same as a sane person. And a lunatic may be made liable for necessities, furnished by a tradesman, who, at the time of supplying the goods, had no reason to suppose him a person of unsound mind. See Cowen's Treatise, p. 265, 266, 267, and cases cited.

[4] Duress of imprisonment, or duress, *per minas*, avoids all contracts. The first, is, where a man is illegally imprisoned in a common prison, or elsewhere. If, in consequence of this, he enters into any contract, it is void, though otherwise, upon a good consideration. But this would not be the case, if in consequence of a legal imprisonment, unless undue, and illegal force be used, or the party is made to endure unnecessary and unlawful privation. And it has been held that if process is sued out ma-

or that it was entered into for or with reference to some unlawful purpose. (1)[5] Chap. XVII.

(1) *Bartlett v. Vinor*, Carth. 252; *Langton v. Hughes*, 1 M. & S. 596; *De Begnis v. Armistead*, 10 Bing. 107; *Gas Light Company v. Turner*, 8 Scott, 609; *Ritchie v. Smith*, 6 C. B. 462; and see *Ewing v. Osbaldiston*, 2 Myl. & Cr. 53; and note, anything to which a statute attaches a penalty is unlawful, although not expressly prohibited; and see *Appleton v. Campbell*, 2 Car. & P. 347.

liciously, and without probable cause, though, in form, regular and legal to arrest and imprison the defendant, and a deed is obtained from him while thus arrested, to procure his deliverance, such deed may be avoided by duress of imprisonment. Duress *per minas*, as where a man is threatened with some personal injury, as death, illegal imprisonment, mayhem, loss of member or the like. If he contracts under the influence of fears thus excited, his contract is void, though upon good consideration. But it is said that a contract obtained by a menace of a mere battery, or trespass, to land or goods, is binding; the law considering that such a threat is not of a nature to overcome a firm and prudent man, for that sufficient and adequate redress may be obtained, if either of such injuries be inflicted. The right of pleading duress in avoidance of a contract, is, like infancy, a personal privilege; and I have no right to plead that I entered into a bond or other contract, with, or in behalf of another, on account of duress upon him. The party cannot avail himself of this defence, except where the contract is made with the person at whose suit or instigation he is arrested, or who makes the threats; if the obligation be made to a stranger, it cannot be said to be done by duress. See Cowen's Treatise, vol. 1, p. 264, 265.

[5] Agreements which contravene the general policy of the common law, or the positive provisions of any statute, are void, although the statute contain no express prohibition. In New York all gaming contracts are void, and all securities for money lent to game with; though an action for the money *itself* lent, on the implied promise, will lie, the law avoiding the security only; so of all wagers and contracts, for or on account of, any money, property, or thing in action wagered. 1 Rev. Stat. of New York, 666. Contracts with a view to future illicit co-habitation or prostitution, are void; but not so of those to pay for past seduction or co-habitation, for the object, in such cases, is supposed to be, the redress of injuries inflicted on the woman. And past co-habitation, even without seduction, is a legal consideration; so that a bond for the same, is good. But a promise in consideration of past seduction, would be void, if it appeared to have been made on the sole consideration of stopping a prosecution for fornication and bastardy. And although a contract made as an indemnity against the consequence of an illegal or immoral act, to be done at a future period, be void; yet a person may indemnify himself against the consequences of an unlawful act already done. 13 Serg. & Rawle, 29; 2 Hall's Sup. Ct. Rep. 579; 1 Caines' 160; 14 John. Rep. 381. Contracts totally to restrain a man from exercising his trade or profession,

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or subsequent waiver

So, admitting its original validity, he may show that it has been since avoided by having without his \*concurrent been altered by the plaintiff in a material part ;(*m*) or by a waiver in writing duly signed by plaintiff(*n*) before the breach which is relied on in the action :(*o*) Sir *E. Sugden* holds it to be the better opinion that a verbal waiver of a written agreement is no defence at law ;(*p*) but the reported cases, although they leave the point doubtful, seem rather to lead to a contrary conclusion :(*q*) and the Statute of Frauds seems merely to take away the remedy by action in the case of a verbal contract, without saying anything to affect the common law right of waiving by word of mouth a contract not under seal.

or release ;

or satisfaction.

So, the defendant, admitting the agreement and its breach, may show that the plaintiff has executed a release under seal ; or has accepted something in satisfaction of the breach ;(*r*) or has already recovered damages in an action upon the agreement ;(*s*) or, that the action has not been brought within the time allowed by the statutes of limitation.

(*m*) *Supra*, p. 118.

(*n*) See *Goss v. Lord Nugent*, 2 Nev. & M. 28 ; *Harvey v. Grabham*, 6 Nev. & M. 754, 762.

(*o*) Where a right of action has actually arisen, this can be discharged only by a release under seal or by the acceptance of something by way of satisfaction ; *Willoughby v. Backhouse*, 2 B. & Cr. 821, 824 ; see *Baylis v. Usher*, 4 Moo. & P. 791.

(*p*) Sug. 174.

(*q*) See *Goss v. Lord Nugent*, 5 B. & Ad. 58, 66 ; *Harvey v. Grabham*, 6 Nev. & M. 754, 762 ; and *Stead v. Dawber*, 10 Ad. & El. 57, 65.

(*r*) *Willoughby v. Backhouse*, 2 B. & C. 821, 824 ; *Baylis v. Usher*, 4 Moo. & P. 791.

(*s*) See 10 Bing. 538.

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or from exercising it throughout the country or state, either for a limited time, or generally, are void. But a contract to restrain its exercise at a particular place or places, is valid. 7 Cowen Rep. 307. An agreement, on the part of a corporation to grant to individuals certain privileges, in consideration that they will withdraw their opposition to the passage of a legislative act touching the interest of the corporation, is against sound policy, prejudicial to just legislation, and void. 1 Aik. Rep. 264.



(7.) *Action, when restrained in equity.*[1]

Equity will restrain an action at law which is incon-

Action, when restrained in equity.

[1] "A writ of injunction," says Story, (2 Story's Eq. Juris., s. 875, *et seq.*) "is in no just sense, a prohibition to the courts of common law, in the exercise of their jurisdiction. It is not addressed to those courts. It does not even affect to interfere with them. The process, when its object is to restrain proceedings at law, is directed only to the parties. It neither assumes any superiority over the court, in which those proceedings are had, nor denies its jurisdiction. It is granted on the sole ground that, from certain equitable circumstances, of which the court of equity granting the process has cognizance, it is against conscience that the party inhibited should proceed in the cause. The object therefore really is to prevent an unfair use being made of the process of a court of law, in order to deprive another party of his just rights, or to subject him to some unjust vexation or injury, which is wholly irremediable by a court of law. One of the plainest cases which can be put of the propriety of granting an injunction to a judgment at law, is, where it has been in fact satisfied, and yet the judgment creditor attempts to set it up, and enforce it, either against the judgment debtor, or against some person claiming under him, who is thereby injured in his property or rights. In such cases, a court of law would often be exceedingly embarrassed in giving the proper redress, if it could give it at all. But courts of equity deal with it at once, and apply the most complete remedial relief. Indeed, without a jurisdiction of this sort, to control the proceedings, or to enjoin the judgments of parties at law, it is most obvious that equity jurisprudence, as a system of remedial justice, would be grossly inadequate to the ends of its institution. Suppose an executor or administrator should be in possession of abundant assets to pay all the debts of the deceased, and, by an accidental fire, a great portion of them should be destroyed, so that the estate should be deeply insolvent. In such a case, he might be sued by a creditor at law, and the loss of the assets by accident would be no defence; for, when he once becomes chargeable with the assets at law, he is forever chargeable, notwithstanding any intervening casualties. But courts of equity will enjoin proceedings at law, in cases of this sort, upon the purest principles of justice. Suppose a party is sued at law for a debt of long standing, and a judgment is obtained against him for the amount, although he has actually paid it; but he is unable, after due search, to find a receipt, or a release, which would establish the fact; and then, after judgment, the paper is unexpectedly found either in his own possession, or in that of a third person. At law, there would be no redress under such circumstances. The judgment would be conclusive. But a court of equity would, in such a case, afford relief by a perpetual injunction of the judgment. Such a suit may be brought without fraud, as by a representative of a deceased party; and, therefore, it may be a case of innocent mistake. Suppose a judgment should be obtained at law, by fraud, for a sum larger than is justly due to the party, upon a mutual understanding of the parties that certain set-offs should be allowed and deducted. There would

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[\*456] sistent with a prior decree between the parties in a suit for specific performance ;(*t*) or an action by a vendor whose bill for specific performance has been dismissed for want of title ;(*u*) but, in general, the dismissal \*of the vendor's bill does not interfere with his right to bring an action ;(*w*) nor is it necessary, although it is usual, to

(*t*) *Reynolds v. Nelson*, 6 Madd. 290.

(*u*) *McNamara v. Arthur*, 2 Ball & B. 353.

(*w*) Sug. 256.

be no remedy at law ; and yet, a court of equity would not hesitate to enjoin the judgment, upon due proof, to the extent of the set-offs. Or, suppose a party were surprised, at the trial, by proof of a claim, of which, from the nature of the declaration, he could have no notice, and was in no default ; and, thus a recovery should be had for an amount not legally due ; the like relief would be granted in equity ; but, at law, the party might be utterly without redress : for he might not be able to bring the case within the ordinary rules for granting a new trial. Another case may easily be supposed, where the defendant at law has a perfect defence ; but, where the facts upon which it depends are exclusively within the knowledge of the plaintiff in the suit. In such a case, a bill of discovery is indispensable to enable the party to make good his defence at law. But if, in the mean time, the plaintiff were permitted to go on at law, and to insist upon a trial, before a discovery was obtained, it is obvious that the law would be an instrument of the grossest injustice. In such a case, a court of equity would decree an injunction to stay proceedings until the discovery was duly obtained.

In some of the cases which have been above supposed, the defendant would have had a complete remedy at law, if, at the time, he had been in possession of the appropriate proofs. But the great mass of cases in which an injunction is ordinarily applied for, to stay proceedings at law, is where the rights of the party are wholly equitable in their own nature, or are incapable, under the circumstances, of being asserted in a court of law. A ready illustration of the former class may be found in the attempt of a trustee, in violation of his trust, to oust the possession of the *cestui que trust* of an estate, to the beneficial enjoyment of which he is entitled ; or, of a landlord to oust the possession of a tenant, with whom he has contracted for a lease, by an ejectment, in violation of that contract ; or of a party setting up a satisfied term, or an outstanding legal incumbrance, to defeat the possession of another person having a better conscientious and equitable title to it. Illustrations of the latter class may be found in the common cases of bonds and mortgages, and other penal securities and covenants where, by the strict rules of law, the party, after forfeiture, can obtain no relief ; in cases of set-offs in equity, which are not recognized at all, at law, as such ; and in cases of partnership property, seized in execution by a creditor of one of the partners, where an injunction will be awarded to stay proceedings until an account of the partnership funds and rights is taken.

state in the decree that the dismissal is without prejudice to the legal right.(x) So, if a plaintiff is proceeding at law and in equity for the same subject-matter, equity will require him to elect between his remedies;(y)[1] but, as we have seen, a court of equity will not, pending a suit by the vendor for specific performance, restrain a purchaser from bringing an action for the deposit;(z) except, perhaps, on the terms of the money being paid into court.(a)

(8.) *General matters relating to the action.*

In an action by the purchaser for non-performance of the agreement, the vendor can require to be furnished with a particular of all matters of fact, (but not of law,) which the plaintiff means to rely on as constituting non-performance;(b) but, if this be not obtained, the latter may prove any matter amounting to a breach of the agreement; and is not restricted by statements which he may previously have made to the vendor.(c)

Particulars of claim.

At law, time is of the essence of the contract;(d)[2] so that the delay of a single day after the time fixed for the delivery of the abstract, or deducing and verifying a mar-

Time is, at law, essential.

(x) See 2 Ball & B. 353.

(y) *Infra*, p. 460.

(z) *Tanner v. Smith*, 4 Jur. 310, Chan.

(a) *S. C., Annesley v. Muggridge*, 1 Madd. 593.

(b) See *Collett v. Thompson*, 3 Bos. & P. 246; *Roberts v. Rowlands*, 3 Mee. & W. 543.

(c) *Squire v. Todd*, 1 Camp. 293; Sug. 428; but see *Todd v. Hoggart*, 1 Moo. & Malk. 128.

(d) *Berry v. Young*, 2 Esp. 640, n.

[1] Courts of equity will not only award an injunction to stay proceedings at law, but they will also, where the party is proceeding at law and in equity for the same matter at the same time, compel him to make an election of the suit, in which he will proceed, and will stay the proceedings in the other court. See 2 Story's Eq. Juris., s. 889; Eden on Injunct. ch. 2, pp. 34, 35, 36, 37, 38; *Rogers v. Vosburgh*, 4 Johns. Ch. Rep. 84.

[2] Time may also be of the essence of the contract in equity. Though mere lapse of time is not, in all cases, an objection to decreeing a specific performance. *Waters v. Travis*, on appeal, 9 Johns. Rep. 450; *Benedict v. Lynch*, 1 Johns. Ch. Rep. 370; *Thompson v. Ketcham*, 8 Johns. Rep. 146.

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ketable title, gives to the purchaser an immediate right of action; nor can time, at law, be varied or enlarged by word of mouth :(e) and, where a time is fixed \*for completion, and the vendor fails to deduce and verify a marketable title before that time, or if, no time being fixed for completion, he deduces a defective title, and the contract is rescinded while the title remains defective, his having a good title at the time of trial will be no defence to the action :(f) but, if no time be fixed for completion, the vendor will be entitled to "a reasonable time" for making out his title :(g) and if, in such case, the purchaser do not apply for the title before bringing an action, it is sufficient if the vendor can make a good title at the time of trial; his having had a defective title, at the date of the contract, is immaterial.(h)[1]

Equitable objections to title a defence at law.

Lastly, we may here remark, that a court of law will consider equitable, as well as legal objections to the title.(i)

(e) *Marshall v. Lynn*, 6 Mee. & W. 109; *Stead v. Dawber*, 10 Ad. & El. 57.

(f) See *Dobell v. Hutchinson*, 3 Ad. & El. 355; *Bartlett v. Tuckin*, 6 Taunt. 259; *Roper v. Coombes*, 6 B. & Cr. 534; *Seaward v. Willock*, 5 East, 198.

(g) *Sansom v. Rhodes*, 8 Sc. 544.

(h) *Thomson v. Miles*, 1 Esp. 184.

(i) Sug. 532, and cases cited; and see *Nerves v. Burrage*, 14 Jur. 177, Q. B.

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[1] In the case here cited, it seems, a man agreed to sell a term, of which he stated forty years to be unexpired. It appeared there were only thirty-nine; but, by an agreement endorsed on the lease, the lessor agreed to add one year to the unexpired term. This agreement was dated after an action brought by the vendor for damages on breach of agreement; and Lord Kenyon ruled that the vendor having, at that time, a good title, it was sufficient. He said that it had been solemnly adjudged, that if a party sells an estate without having title, but before he is called upon to make a conveyance, gets such an estate as will enable him to make a title, that is sufficient: That here the plaintiff being enabled to make a title, and the defendant never having applied for it, he should not be allowed to set up a want of title, though the power of making that title was obtained after the action was brought.

## \*CHAPTER XVIII.

## AS TO SPECIFIC PERFORMANCE.

1. *Matters relating to the jurisdiction generally.*
2. *By whom specific performance may be enforced.*
3. *Against whom it may be enforced.*
4. *As to the parties to the suit.*
5. *As to the bill.*
6. *As to proceeding by claim under the orders of April, 1850.*

7. *As to how the plaintiff's case may be sustained in the absence of a written agreement—fraud—part-performance—admission by defendant of parol agreement—parol variation of written agreement.*

8. *As to grounds of defence negating plaintiff's right to specific performance except with a variation of the original agreement; viz., fraud—mistake—surprise—misrepresentation—unfulfilled promise—parol variation, etc.*

9. *As to grounds of defence negating in toto plaintiff's right to specific performance; viz., personal incapacity—nature of contract, or fraud, &c., &c., attending its execution—matters relating to the estate—title—or consideration—plaintiff's conduct, &c., after contract—election of other remedy.*

10. *As to the proceedings in the suit; viz., payment of purchase-money into court—reference of title and proceedings thereon—decree for plaintiff—conveyance—decree dismissing bill.*

11. *As to costs.*

(1.) THE only remedy to be obtained in equity for the non-performance of the contract, is a decree for specific performance; (a)[1] at one time, there was a floating idea

Specific performance the only remedy in equity.

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(a) Specific performance of contract for sale or purchase of railway shares will be enforced; *Duncuft v. Albrecht*, 12 Sim, 189, affirmed 199; *Shaw v. Fisher*, 12 Jur. 152; *Wynne v. Price*, 13 Jur. 295.

[1] By the common law, every contract or covenant to sell or transfer

Ch. XVIII in the profession that the court might award compensation for non-performance, in the event of the primary re-

a thing, if there is no actual transfer, is treated as a mere personal contract or covenant; and, as such, if it is unperformed by the party, no redress can be had, except in damages. But courts of equity require a strict performance from the offending party, of what he cannot, without manifest fraud or wrong, refuse. The jurisdiction of equity in decreeing a specific performance of contracts does not depend upon, nor is it affected by the form or character of the instrument. It is only necessary that the transaction, in substance, amounts to, and is intended to be a binding agreement for a specific object, whatever may be the form or character of the instrument. Hence, if a bond with a penalty is made upon condition to convey certain lands, upon the payment of a certain price, it would be deemed in equity an agreement to convey the land at all events, and not to be discharged by the payment of the penalty, although it has assumed the form of a condition only. In all such cases, equity looks to the substance of the transaction, and the primary object of the parties; and where that requires a specific performance, they will treat the penalty as a mere security, for its due attainment. The ground of the jurisdiction is, that a court of law is inadequate to decree a specific performance, and can relieve the injured party only by a compensation in damages, which would often fall short of redress. "And this," says Story, (2 Story's Eq. Juris., s. 717,) "constitutes the true and leading distinction, in the present exercise of equity jurisdiction in England, in regard to decreeing specific performance. It does not proceed, as is sometimes erroneously supposed, upon any distinction between real estate and personal estate, but upon the ground that damages at law may not, in the particular case, afford a complete remedy. Thus, courts of equity will decree performance of a contract for land, not because of the particular nature of land, but because the damages at law, which must be calculated upon the general value of the land, may not be a complete remedy to the purchaser, to whom the land purchased may have a peculiar and special value."

"It has been said in a late case," continues Story, (2 Story's Eq. Juris., 741, *et seq.*) "that it may be safely laid down as a general proposition, notwithstanding many exceptions, that an agreement, in order to call for a specific performance by the decree of a court of equity, must be such an agreement as might have been made the subject of an action at law. This language, when understood in a qualified sense, is doubtless correct; for generally, if a party does not contract personally at law, equity will not create a personal obligation on his part, unless under peculiar circumstances. But the whole class of cases of specific performance of contracts respecting real estate, where the contract is by parol, and there has been a part performance, or where the terms of the contract have not been strictly complied with, and yet equity relieves the party, are proofs that the right to maintain a suit in equity, to compel a specific performance, does not, and cannot properly be said to depend upon the party's having a right to maintain a suit at law for damages. In cases of specific performance, courts of equity sometimes follow the law, and sometimes go far beyond the law; and their doctrines, if not wholly independent of

lief failing; but the contrary has been settled by modern decisions: (b) nor does it make any difference that compensation is sought, not against the owner of the estate, but against a person who falsely assumed authority to sell. (c)

The Court of Review, (or now the Court of Bankruptcy,) cannot enforce specific performance against a purchaser who has not expressly submitted himself to the jurisdiction; (d) nor, perhaps, even against one who is willing so to submit himself. (e)

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Court of Bankruptcy cannot enforce specific performance, *semble*.

The principle by which courts of equity have professed to be guided in decreeing specific performance of a contract for purchase, is, that damages at law may not, in the

Inadequacy of damages the principle on which specific performance is decreed.

(b) *Todd v. Gee*, 17 Ves. 273; *Sainsbury v. Jones*, 5 Myl. & Cr. 1, see p. 3.

(c) *Sainsbury v. Jones*, 5 Myl. & Cr. 1.

(d) *Ex parte Cutts*, 3 Dea. 242, overruling *Ex parte Gould*, 1 G. & J. 231; *Ex parte Sidebotham*, 3 D. & C. 818; and *Ex parte Barrington*, 4 D. & C. 461.

(e) See *Ex parte Bennett*, 10 Ves. 362.

the point, whether damages would be given at law, are not, in general, dependent upon it. Whoever should assume the existence of a right to damages in an action at law, as the true test of the jurisdiction in equity, would find himself involved in endless perplexity; for, sometimes damages may be recoverable at law, where courts of equity would yet not decree a specific performance; and, on the other hand, damages may not be recoverable at law, and yet relief would be granted in equity. In truth, the exercise of this whole branch of equity jurisprudence respecting the rescission and specific performance of contracts, is not a matter of right, in either party; but, it is a matter of discretion in the court; not, indeed, of arbitrary or capricious discretion, dependent upon the mere pleasure of the judge, but of that sound and reasonable discretion which governs itself, as far as it may, by general rules and principles; but, at the same time, which withholds, or grants relief, according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties. See *Hepburn v. Auld*, 6 Cranch, 262; *Hatch v. Cobb*, 4 Johns. Ch. Rep. 559; *Kempshal v. Stone*, 5 Johns. Ch. Rep. 193; *Hepburn v. Dunlop*, 1 Wheat. Rep. 197; *Long v. Colston*, 1 Hen. & Munf. 110; *Perkins v. Wright*, 3 Har. & M'Hen. 326; *Colwyn v. Thompson*, 2 Wheat. 336; *Barry v. Delouch*, 2 Dev. 398; *White v. Flora*, 2 Dev. 430; *Low v. Treadwell*, 3 Fairfield, 441; 3 Stewart, 280; *Rogers v. Saunders*, 4 Maine Rep. 92; *Tobey v. The County of Bristol*, 3 Story's Rep. 800; *Morris v. Elmendorf*, 11 Paige, 277; *Matthews v. Ternilliger*, 3 Barb. Sup. Rep. 50; *Stevenson v. Maxwell*, 2 Comstock Rep. 408.

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But, on  
ground of  
mutuality of  
remedy,  
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particular case, afford a complete remedy; (f) they will, therefore, decline to interfere if the subject-matter of the contract be such that both vendor and purchaser would be reimbursed by damages; as on an ordinary agreement for the sale of stock: (g) [2] in the case of land, the purchaser's right to sue can never be questioned upon this ground; for the land may, to him, have "a peculiar and special value; (h) it is more difficult to understand why the courts should entertain a suit by a vendor, who, the title being accepted and there being nothing special in

(f) See *Adderley v. Dixon*, 1 Sim. & St. 610.

(g) *Cud v. Rutter*, 1 P. Wms. 570; *Nutbrown v. Thornton*, 10 Ves. 159, 161.

(h) 1 Sim. & St. 610.

[2] Upon the principles of natural justice, courts of equity might insist upon decreeing a specific performance of all *bona fide* contracts. The reason why a contract for stock is not specifically decreed is, that it is ordinarily capable of such an exact compensation. But cases of a peculiar stock may be supposed, where courts of equity might still feel themselves bound to decree a specific performance, upon the ground that from its nature it has a peculiar value, and is incapable of compensation in damages. And it has been thought that in contracts for stock, a bill ought now to be maintainable generally in equity, for a specific delivery thereof, upon the ground that a court of law cannot give the property, but can only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party. See 2 Story's Eq. Juris. sec. 717.

"Although," says Story, (2 Story's Eq. Juris. sec. 724,) "the doctrine seems well settled that a contract for the sale of stock will not now be decided to be specifically performed, because it is ordinarily capable of an exact compensation in damages; yet it is well known that as late as Lord Hardwicke's time, such contracts were so decreed in chancery. And even in our own times, it has been held that a bill will lie for a specific performance of a contract for the purchase of government stock, in favor of a holder of scrip receipts, purporting to give the title to the bearer thereof, where the bill prayed for the delivery of the certificates, which gave the legal title to the stock, upon the ground that a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party. If this, however, be a sufficient ground to entertain the jurisdiction, it seems universally applicable to all for a specific performance. In the Supreme Court of the United States, an inclination has been evinced to maintain a far more extensive jurisdiction in equity, to grant relief by a specific performance in contracts respecting personal chattels, that is at present exercised in the English courts."



the case, wants nothing but his purchase-money and interest, which an action at law would give him; it appears, however, to be settled that, upon the principle of affording mutual remedies, the court will entertain such a suit; (i) whether the consideration be a life annuity, or a gross sum. (k)

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vendor who only wants his purchase money may sue in equity.

Whether the mere fact of the defendant being bound under an act of parliament to complete the contract, and of the plaintiff having an easier remedy by mandamus, will prevent the latter from resorting, (if he please,) to a court of equity, seems to be doubtful; (l) if, however, a plaintiff proceed both at law and in equity for the same subject-matter, he may, by order of course, be compelled to elect between his action and suit; (m)[1] and this relief

Whether the existence of an easier remedy by mandamus is a bar.

Plaintiff cannot proceed at once at law and in equity.

(i) *Withy v. Cottle*, 1 Sim. & St. 174; *Adderley v. Dizon*, ib. 607; *Clifford v. Turrell*, 1 Y. & C. C. C. 138; see V. C. Wigram's judgment in *Adams v. Blackwall Railway Company*, 13 Jur. 621.

(k) *Clifford v. Turrell*, *ubi supra*; affirmed, 9 Jur. 633.

(l) See *Walker v. Eastern Counties Railway Company*, 6 Ha. 594; *Adams v. Blackwall Railway Company*, 13 Jur. 620, V. C. Wigram, reversed on appeal, 2 Mac. & G. 118; see also *Hyde v. Edwards*, 13 Jur. 757, R.

(m) Danl. Ch. P. by H. 791, 793; *Royle v. Wynne*, Cr. & Ph. 252.

[1] Under the former chancery system of the state of New-York, if a complainant sued a defendant the same time at law and in equity, the defendant might apply to the court of chancery for an order that the complainant make his election in which court he will proceed. This motion must be made after the defendant had put in his answer; and the order was, that the complainant elect, within eight days after the service thereof; and that if he elects to proceed at law, the bill be dismissed. If the complainant, after an order to elect, elected to proceed in equity, chancery would restrain his proceedings at law, by injunction. But if he elected to proceed at law, and failed there, the dismissal of his bill would be no bar to his filing a new bill for the same matter. If the complainant considered that the bill and action were for different matters, and that he ought not to be compelled to elect, he might oppose the motion on that ground; and the court would examine the pleadings in each suit, and generally decide without further inquiry. But the ordinary practice was to obtain an order of reference to ascertain if the complainant's proceedings at law and in equity related to the same matters. This, however, was granted only in cases of difficulty. If it clearly appeared that both suits were not for the same matter, the court would determine without the reference. If a reference was granted, it operated as a stay of proceedings in both suits in the mean time. If the master reported that the matters of the two suits were distinct, the order for the complainant to

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has been afforded where a landlord had filed a bill against his tenant for specific performance of an agreement to take a lease, and was also suing him for use and occupation of the premises during part of the term ;(*n*) but where the action is brought for the non-performance of particular acts :—*e. g.*, to improve or repair the property—the performance of which is not specifically prayed by the bill, or which are acts the specific performance of which cannot be decreed, and the action is brought only for such damages as were sustained up to the time of its commencement, no case for election seems to arise.(*o*)

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Specific performance where decreed, although contract may vest estate in purchaser.

And although the agreement may in itself vest in the \*purchaser the interest contracted for,(*p*) yet, if it appear on its face that a further instrument is necessary to carry out the intentions of the parties, the court will decree specific performance of the agreement in that particular.(*q*)

(2.) *By whom specific performance will be enforced.*

Enforced in equity at suit of purchaser, or his representatives in interest ;

Equity will enforce specific performance of the contract for sale at the suit of the purchaser himself, or of his representatives in interest,—such interest, it must be remembered, being the right to take the estate on payment of the purchase-money :—*e. g.*, his alienees by act *inter*

(*n*) *Ambrose v. Nott*, 2 Ha. 649.

(*o*) See *Fennings v. Humphery*, 4 Beav. 1, 7.

(*p*) *Sed vide supra*, 115.

(*q*) *Fenner v. Hepburn*, 2 Y. & C. C. C. 159.

elect, was discharged with costs. The right to put the complainant to an election was not confined to suits brought in our own courts; but he might be compelled to elect whether he would proceed in those, or in a foreign court. The complainant was entitled to a complete answer before he could be put to his election; for, possibly he could not decide in which court it would be most advisable he should prosecute his claim until he had a full and complete answer from the defendant. He therefore could not be put to his election, after exceptions were filed, until they were answered. And it was irregular to obtain an order to elect, before the common time for filing exceptions had expired. A special application to the court, on notice to the complainant's solicitor, was necessary, to obtain an order that the complainant elect. Which application should be founded on an affidavit stating that the two suits are brought for the same purpose, and upon copies of the pleadings in each suit, to show that the matters in both suits are identical. See *Barb. Ch. Rep.*, vol. 1, pp. 247, 248.

*vivos*,<sup>(r)</sup> or assignees in bankruptcy,<sup>(s)</sup> or committees in lunacy,<sup>(t)</sup> or, in case of his death, by his real or personal representatives, (according to the nature of the estate contracted for.) Ch. XVIII.

So, the contract for purchase will be enforced at the suit of the vendor himself, or his representatives in interest;—such interest, it must be remembered, being the right to receive the purchase-money on a conveyance being given of the estate:—*e. g.*, his alienees by act *inter vivos*,<sup>(u)</sup> or assignees in bankruptcy,<sup>(w)</sup> or committees in lunacy,<sup>(x)</sup> or, (in the case of death,) by his executors or administrators;<sup>(y)</sup> so, if the contract have been entered into by a tenant for life, in due<sup>(z)</sup> exercise of a power, specific performance will, it is conceived, be decreed at the suit of a remainderman.<sup>(a)</sup>[1] or of vendor, or his representatives in interest.

(r) See *Nellhorpe v. Holgate*, 1 Coll. 218.

(s) See 6 Geo. IV. c. 16, s. 76; 12 and 13 Vict. c. 106, s. 146.

(t) See Shelf on Lun. 546, *et seq.*

(u) See Calv. on Par., 2nd ed. 314; Dan. Ch. Pr. by H., 206.

(w) See 12 and 13 Vict. c. 106, ss. 141, 142.

(x) Shelf. on Lun. 564.

(y) *Roberts v. Merchant*, 1 Phil. 370.

(z) But not otherwise, *Ricketts v. Bell*, 1 De G. & S. 335.

(a) See *Shannon v. Bradstreet*, 1 Sch. & Lef. 52, 65; *Lowe v. Swift*, 2 Ball. & B. 529; 2 Sug. Pow, 6th ed. p. 134; 1 De G. & S. 344.

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[1] In general, where the specific execution of a contract respecting lands will be decreed between the parties, it will be decreed between all persons claiming under them in privity of estate, or of representation, or of title, unless other controlling equities are interposed. If a person purchase lands with knowledge of a prior contract to convey them, he is affected by all the equities which affected the lands in the hands of the vendor. The lien of the vendor for the purchase-money attaches to them; and such purchaser may be compelled either to pay the purchase-money or to surrender the land, or to have it sold for the benefit of the vendor. In this view, the remedy of the vendor against such purchaser may be said to be *in rem* rather than *in personam*. On the other hand, if the vendee under such a contract conveys the same to a third person, the latter, upon paying the purchase-money, may compel the vendor, and any person claiming under him in privity, or as a purchaser with notice, to complete the contract, and convey the title to him. The general principle upon which this doctrine proceeds, is, that from the time of the contract for the sale of the land, the vendor as to the land becomes a trustee for the vendee, and the vendee, as to the purchase-money, a trustee for the vendor, who has a lien upon the land therefor. And every subsequent

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\*(3.) *Against whom specific performance will be enforced.*

Enforced against vendor, and parties claiming under him by subsequent title, (except purchasers without notice;)

and against parties claiming under a prior title, which he might have displaced by conveyance.

Equity will enforce specific performance of the contract for sale, against the vendor himself, and also against, first, persons claiming under him by a title arising subsequently to the contract; (except purchasers for valuable consideration who have paid their money and taken a conveyance without notice of the original contract): *e. g.*, his assignees in bankruptcy,(b) or committees in lunacy,(c) or voluntary alienees,(d) or judgment creditors,(e) or the after-taken wife or husband of the vendor,(f) or the vendor's alienees for value, (if they purchase with notice of the prior contract,(g) or have not taken a conveyance,)(h) or, (in case of his death,) against his real or personal representatives, (according to the nature of the estate contracted for;) and secondly, persons claiming under a title which, although prior to the contract and known to the purchaser, might have been displaced by a conveyance by the vendor: *e. g.*, voluntary alienees;(i) wife entitled to freebench, (if, as if the case in most manors, her title

(b) *Orlebar v. Fletcher*, 1 P. Wms. 737; *Taylor v. Wheeler*, 2 Ver. 564; and see 2 Ves. sen. 633; *Parker v. Smith*, 1 Coll. 608.

(c) Shelf. on Lun. 564; 1 Will. IV. c. 65, s. 27.

(d) See *Hinton v. Hinton*, 2 Ves. sen. 631, 633.

(e) *Brunton v. Neale*, 14 L. J., N. S., L. C. 8.

(f) See 2 Ves. sen. 633.

(g) *Daniels v. Davison*, 16 Ves. 249; *Lightfoot v. Heron*, 3 You. & C. 586; *Cutts v. Thodey*, 1 Coll. 223; *Potter v. Sanders*, 6 Ha. 1.

(h) As to which, *vide supra*, 392.

(i) *Buckle v. Mitchell*, 18 Ves. 100; *Metcalf v. Pulvertoft*, 1 Ves. & B. 180; *Wallats v. Busby*, 5 Beav. 193; but the voluntary settler, if he contract to sell the estate, cannot himself enforce specific performance; *Smith v. Garland*, 2 Mer. 123; *Johnson v. Legard*, Turn. & R. 281.

purchaser from either, with notice, becomes subject to the same equities as the party would be from whom he purchased. In cases of this sort, if the original vendee dies, after having sold the lands to a third person, who is to pay the purchase-money, his personal representatives are entitled to proceed against such purchaser in equity to indemnify them, and to pay the purchase-money. On the other hand, if the vendor dies, his personal representatives may enforce the lien for the purchase-money against the land in the possession of the purchaser. See 2 Story's Eq. Juria. secs. 788, 789.

depends upon her husband dying seised ;)(*k*) dowress who married since the late Dower Act came into operation ;(*l*) and remaindermen, or *cestuis que trust*, in cases where the \*vendor has contracted in due exercise of a power or pursuant to a trust :(*m*) subject, nevertheless, to these exceptions, viz., that the contract of a tenant in tail who dies before executing the conveyance, does not affect the interests of the issue in tail or remaindermen ;(*n*) and that the contract of a trustee will not be enforced if the attendant circumstances constituted it a breach of trust. (*o*) [1]

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The contract by a married woman, either with or without her husband's concurrence, for the sale of her real estate not settled to her separate use or appointment, (other than her chattels real,)(*p*) is incapable of being enforced against her :(*q*) nor will it, although signed with the husband's concurrence and in his presence, bind any interest which he may then unknowingly have, or subsequently acquire, in the property :(*r*) if, having a power of appointment, she enter into a contract executed with the formalities required by the power, (*s*) or if, as respects estate settled merely to her separate use with no restraint on anticipation, she enter into such a contract as would bind her if a *feme sole*, (*t*) the estate, it is conceived, in either case is bound, although no decree can be made against her per-

Contract for sale of married woman's estate, when capable of being enforced.

(*k*) *Hinton v. Hinton*, 3 Ves. sen. 631; *Brown v. Raindle*, 3 Ves. 256.

(*l*) 3 and 4 Will. IV. c. 105, ss. 4 and 5.

(*m*) *Mortlock v. Buller*, 10 Ves. 315; *Dowell v. Dew*, 1 Y. & C. C. C. 345; and see cases cited, *supra*, 461, n. (*a*.)

(*n*) 3 and 4 Will. IV. c. 74, s. 47; and see, as to the same being the rule before the act, *Frank v. Mainwaring*, 2 Beav. 115; Sug. 227.

(*o*) *Mortlock v. Buller*, 10 Ves. 292; *White v. Cuddon*, 8 Cl. & Fin. 766.

(*p*) As to which see next paragraph.

(*q*) *Emery v. Wase*, 5 Ves. 846; *Davidson v. Gardner*, Sug. 230; *Aylett v. Ashton*, 1 Myl. & Cr. 105; see *Lassence v. Tierney*, 1 Mac. & G. 572.

(*r*) *Aylett v. Ashton*, 1 Myl. & Cr. 105.

(*s*) See Sug. 230, n. (*p*); *Martin v. Mitchell*, 2 Jac. & W. 425.

(*t*) *Stead v. Nelson*, 2 Beav. 245.

[1] If trustees under a power of sale, make a legal contract for sale of the estate, the contract binds the estate; and though by the death of parties, the power should be extinguished, yet the contract must be executed by those who have got an interest by the extinguishment of the power.

Ch. XVIII. sonally :(u) and even in the case of an agreement in exercise of a power, the want of mere formalities, may, it seems, be supplied : *e. g.*, where a married woman having a power to appoint by deed enters into a \*contract not under seal, specific performance may be decreed ;(w)[1] but this, it is conceived, would not be the case where the omission went to the substance of the power, or consisted in the want of formalities which were intended for her protection.(x)[2]

(u) *Nantes v. Corrock*, 9 Ves. 189; *Aylett v. Ashton*, 1 Myl. & Cr. 112; *Francis v. Wizell*, 1 Madd. 258.

(w) See *Slead v. Nelson*, *ubi supra*; *Dowell v. Dew*, 1 Y. & C. C. C. 345.

(x) See *Lassence v. Tierney*, 1 Mac. & G. 551, 572.

[1] In the case here cited the court remarked "This estate was vested in Mrs. Waterworth for her life, for her separate use. Now supposing a legal estate to have been vested in her, a court of law would take no notice of the words for her separate use; but in this court, those words would give her, during coverture, the same right over the estate, as she would have had, if she had been a *feme sole*. Having that right, she enters into a contract, whereby, in consideration of a sum of 120*l.* she agrees to execute a mortgage of this estate. That which was vested in her, and over which her power extended, was her life estate. It is true, that her life might be prolonged beyond the life of her husband; if so, the consequence would be, that she would then have, both in equity, as well as at law, an absolute power of disposition over that life estate, and I cannot say that I think that the analogy of a reversionary interest in a *chose in action*, in any way applies to this case. It appears to me, that she had a power to enter into this agreement, which must be specifically performed with costs, and it must be declared that the plaintiff's mortgage is entitled to priority over that of Mr. Tolson.

[2] A *feme covert* may mortgage her real estate for her husband's debts. *Demerest v. Wynkoop*, 3 John. Ch. Rep. 129. And she may execute by will, a power in favor of a husband, given to her when *feme sole* over her real estate. *Bradish v. Gibbs*, 3 John. Ch. Rep. 523. The power of a married woman over her separate estate, does not extend beyond the plain meaning of the deed creating the estate. She is therefore to be considered a *feme sole* in relation to the estate, only so far as the deed has expressly conferred on her the power of acting as a *feme sole*. *Morgan v. Elam*, 4 Yerger, 375. A woman, before marriage, conveyed to a trustee, with the assent of her intended husband, all the property, real and personal, which she then had, or might acquire after marriage, to be held by such trustee for her sole and separate use, and reserved to herself, in the instrument of conveyance, full power to dispose of all such property by will, or otherwise. After marriage, she purchased, and took a deed of real estate, which she, jointly with her husband, conveyed to the same trustee,

It does not appear to be settled,<sup>(y)</sup> whether the husband's contract to sell the term for years, (whether legal or equitable, of his wife, would bind her surviving: some early authorities are in favor of the purchaser;<sup>(z)</sup> but, in recent decisions, so strong an inclination has been shown

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Whether wife surviving is barred by husband's contract for sale of her chattels real.

(y) See the query of V. C. K. Bruce, in *Clark v. Burgh*, 2 Coll. 226.

(z) See *Stead v. Cragh*, 2 Eq. Ca. Ab. 37, 130; and Lord Eldon's remarks in *Druce v. Denison*, 6 Ves. 394.

for her sole and separate use. She afterwards executed her last will, thereby disposing of all the real estate which had been "reserved" by her, and also of all such real estate as she might die seized and possessed of which she might thereafter purchase. After the execution of the will, she purchased real estate of which she was the legal owner at her decease. Held, that she might lawfully dispose, by will, of all the estate which had been conveyed as aforesaid to the trustee, before the will was executed; and that the will ought to be admitted to probate, although the real estate acquired by the testatrix after the will was executed might not pass thereby. *Holman v. Perry*, 4 Met. Rep. 492. It is not necessary that the legal estate should be vested in trustees, to enable a feme covert to dispose of her separate estate, in equity. A mere agreement entered into, before marriage with her husband, that she shall have the power to dispose of her real and personal estate, during coverture, will enable her to do so. *Strong v. Skinner*, 4 Barb. S. C. Rep. 546. Although such an agreement becomes extinguished, at law, by the subsequent marriage, yet equity supports it, and will compel the husband to perform it. *Ib.* She has the right, not only of selling her separate property, but with the proceeds thereof, of purchasing other property, even from her husband, and to hold the substituted property as her separate estate, free from the control or debts of her husband. *Ib.* And she may purchase with her separate estate, either mortgages or judgments against her husband, and hold such securities as a part of her separate estate, and enforce the collection thereof by a sale of the mortgaged premises, or of the lands subject to the lien of the judgments. And, at the sale, she may purchase in her own name, the real estate of her husband, and hold the land so purchased as part of her separate estate. *Ib.* In that manner, a *feme covert* may exercise the same control over her real estate, for the benefit of her husband, as she could, if it was held by a trustee, with a power in her to appoint it to whom she pleased. All that the court of chancery will do in such cases, is to see that the wife has not been imposed upon by her husband, by his taking an unconscientious advantage of her situation. *Ib.* Vide 1 Ves. Jur. Rep. 189. 11 *Ib.*, 222. 3 Johns. Ch. Rep. 523. See *Livingston v. Livingston*, 2 John. Ch. Rep. 537; *Ewing v. Smith*, 3 Des. 417, 429; *Dibble v. Hutton*, 1 Day, 221; *Jaques v. Methodist Episcopal Church on Appeal*, 17 Johns. Rep. 548; S. C. 1 John. Ch. Rep. 450 and 3 John. Ch. Rep. 77; *Bethune v. Beresford*, 1 Des. 174; *Lee et al. v. Bank of U. S.* 9 Leigh, 900; *Hamlin v. Bridge*, 11 Maine Rep. 145.

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to limit the husband and his alienees to their strict legal rights, that it may be reasonably conjectured that the wife surviving would not be bound.(a)

Whether she  
may adopt  
his contract.

In one case(b) a question arose, but was not decided, as to whether the wife surviving may *adopt* her husband's contract for sale of her real estate.

Vendor's  
contract  
cannot be  
enforced  
against  
parties  
claiming  
under  
prior  
absolute  
title.

And the vendor's contract will, of course, not be enforced against persons claiming under a prior title which he himself could not have displaced by a conveyance; *e. g.*, a dowress under the old law, or a wife seised of an estate of inheritance; nor will the contract of a tenant for life be enforced against the trustees of the reversion who are empowered but decline to sell at his request.(c)[1]

Purchaser's  
contract will  
be enforced  
against him-  
self and his  
representa-  
tives.

[\*465]

So, the contract for purchase will be enforced against the purchaser himself, his committees in lunacy,(d) and real and personal representatives. If he become bankrupt, his assignees have the option of abandoning the contract or of completing it, (paying, of course, the entire amount due for purchase-money,) and the vendor may, by application to the court, compel them to make their election.(e) It is however conceived, that if, (as might sometimes happen, *e. g.*, in the case of house property destroyed by fire after the contract,) the vendor were willing to convey the estate and to prove under the bankruptcy for the purchase-money, he would have a right to do so. Where the purchaser, having paid part of the purchase-money, becomes insolvent, and his assignees, upon a bill being filed against them, disclaim, the court will declare

(a) *Sturgis v. Champneys*, 5 Myl. & Cr. 97; *Elwyn v. Williams*, 7 Jur. 337; *Ashby v. Ashby*, 1 Coll. 553; *Newenham v. Pemberton*, 1 De G. & S. 644; *Whittle v. Henning*, 2 Ph. 731.

(b) *Humphreys v. Hollis*, Jac. 76.

(c) *Thomas v. Dering*, 1 Keen, 729.

(d) *Shelford on Lunacy*, 564, Sug. 233.

(e) 12 & 13 Vict. c. 106, s. 146.

[1] Where a power of sale is given to trustees, although to be executed at the request of the tenant for life, it is discretionary whether they will exercise the power, and therefore, if they think it disadvantageous to their *cestuis que trust* they cannot be compelled to adopt a contract entered into by the tenant for life for sale of the estate.



the representatives of the vendor absolutely entitled to the estate.(f) Ch. XVIII.

A married woman's separate estate may be liable under her contract for purchase; but the vendor's suit must be directed specifically against such separate estate, and should not seek a decree against her personally.(g)[1] Against separate estate of married woman.

(4.) *As to the parties to the suit.*[2]

In general, it is only necessary to make those persons Parties to contract are,

(f) *Gabriel v. Sturgis*, 5 Ha. 97.

(g) *Francis v. Wizzell*, 1 Madd. 258; and see *Owens v. Dickenson*, Cr. & Ph. 48; *Muston v. Bradshaw*, 10 Jur. 402, V. C. E.; 15 Sim. 192; *Gaston v. Frankum*, 2 De G. & S. 561.

[1] At law, a married woman is generally incapable of entering into any valid contract, to bind either her person, or her estate. So also, in equity, she cannot, by contract, bind her person, or her property, generally. The only remedy, is against her separate property. The ground of the distinction between her separate property and her other property, is that as to the former, she is treated as a *feme sole*, having the general power of disposing of it; but as to the latter all the legal disabilities of a *feme covert* attach upon her. Her separate estate, will, in equity, be held liable for all the debts, charges, incumbrances, and other engagements which she does expressly, or by implication, charge thereon; for having the absolute power of disposing of the whole, she may *a fortiori*, dispose of a part thereof. Still, her agreement creating the charge, is not, properly speaking, an obligatory contract, since as a *feme covert*, she is incapable of contracting; but is rather an appointment out of her separate estate. The power of appointment being incident to the power of enjoyment of her separate property, every security thereon, executed by her, is to be deemed an appointment *pro tanto* of the separate estate. The chief difficulty is in ascertaining what circumstances, in the absence of any positive expression of an intention to charge her separate estate, shall be deemed sufficient to create such a charge. "It has been remarked," says Story, (2 Story's Eq. Jur. sec. 1400,) "that the rule of holding that a general security, executed by a married woman, purporting only to create a personal demand, and not referring to her separate property, shall be intended as *prima facie* an appointment or charge upon her separate property, is a strong case of constructive implication by courts of equity founded more upon a desire to do justice than upon any satisfactory reasoning. The main argument in favor of it, seems to be, that the security must be supposed to have been executed with the intention that it shall operate in some way; and that it can have no operation, except as against her separate estate. If this reasoning be correct, it will equally apply to all her general pecuniary engagements; for she has no other means of satisfying them, except out of her separate estate."

[2] There is an important distinction between the case of a plaintiff

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in general,  
alone neces-  
sary parties  
to the suit.

Purchaser  
cannot join  
as co-de-  
fendant,  
receiver, or  
steward.

[\*466]

Or parties  
claiming  
adverse in-  
terests prior  
to the con-  
tract.

parties to a suit for specific performance who were parties to the contract: (h) for instance, a purchaser cannot join as co-defendants the receivers or stewards of the owners of the estate, although they are in that capacity possessed of the title deeds delivery of which is sought by the suit; (i) nor, it would seem, the wife of the vendor who has possessed herself of the deeds; (k) nor a mortgagor, whose mortgagee, or mortgagee's trustees, has entered into the contract under a mortgage power of or trust for sale; (l) nor, upon a sale by a mortgagor, the mortgagee, nor any person interested in the equity of redemption; (m) nor a person who has joined the vendor in the sale in respect of other property, under conditions, as to laying out roads, &c., affecting the whole estate; (n) nor, as a general rule, any person upon the ground of his claiming any adverse interest which was vested in him prior to the contract. (o) [1]

(h) *Humphreys v. Hollis*, Jac. 75; *Wood v. White*, 4 Myl. & Cr. 460.

(i) *M'Namara v. Williams*, 6 Ves. 143.

(k) *Muston v. Bradshaw*, 10 Jur. 402, V. C. E.; 15 Sim. 192.

(l) *Clay v. Sharpe*, 18 Ves. 346, n.; *Corder v. Morgan*, *ib.* 344.

(m) *Tasker v. Small*, 3 Myl. & Cr. 63.

(n) *Peacock v. Penson*, 11 Beav.; see p. 359.

(o) *Delabere v. Norwood*, 3 Sw. 144; *Petre v. Duncombe*, 7 Ha. 24; 3 Ag. 252; but see a case of *Collett v. Hover*, 1 Coll. 227.

seeking a specific performance in equity, and the case of a defendant resisting such a performance. The specific execution of a contract in equity, being a matter not of absolute right in the party, but of sound discretion in the court, it requires much less strength of case on the part of the defendant to resist a bill to perform a contract, than it does on the part of the plaintiff, to maintain a bill to enforce a specific performance. There is a settled distinction, between the case of a vendor coming into a court of equity to compel a vendee to performance, and of a vendee resorting to equity to compel a vendor to perform. In the first case, if the vendor cannot make out a title, as to part of the subject-matter of the contract, equity will not compel the vendee to perform the contract *pro tanto*. But when a vendee seeks a specific execution of an agreement, there is much greater reason for affording him the aid of the court, when he is desirous of taking the part to which a title can be made. *Waters v. Travis*, on Appeal, 9 Johns. Rep. 450.

[1] As a general rule, neither the vendor, nor the purchaser, can involve third persons in a proceeding to enforce a specific performance, any more than they could be made parties to an action for a breach of contract.

Nor need a stranger to a contract be made a party to a suit on the ground of his being interested in the contract, or bound to concur in the conveyance; as where, on the sale in two lots of leaseholds held under an entire rent, it was stipulated that the purchaser of each lot should be a party to the assignment of the other lot, for the purpose of entering into the covenants by way of indemnity usual in such cases, it was held, that the purchaser of lot 2 was not a necessary party to the vendor's bill for specific performance of the purchase of lot 1; (p) so, where a land-owner agreed to sell land to a railway company, and to buy his tenant's interest, it was held that the tenant was not a necessary party to the vendor's bill for specific performance and to restrain trespass by the company. (q)

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Person interested in contract, and bound to join in conveyance, not a necessary party to vendor's bill.

Persons having rights adverse to or inconsistent with those of the vendor, or having no rights in the subject-matter of the suit, ought not to be joined with as co-plaintiffs: (r) and if, being infants, they were so joined in respect of adverse or inconsistent rights, the court would \*refuse to make a decree, even by consent: (s) nor can parties claiming such rights be made defendants to the purchaser's bill: (t) but they may, it would appear, (and this seems to form an exception from the above general rule,) be made defendants to the vendor's bill. (v)

Persons having adverse, inconsistent, or no rights, cannot join the vendor as co-plaintiff; [467]

but may be made defendants, *sempre*

(p) *Palerson v. Long*, 5 Beav. 186.

(q) *Robertson Great Western Railway Company*, 10 Sim. 314, C.

(r) See *Fulham v. McCarthy*, 1 H. L. C. 703; *Padwick v. Platt*, 11 Beav. 503.

(s) See *Wood v. White*, 4 Myl. & Cr. 483.

(t) *Tasker v. Small*, 3 Myl. & Cr. 63.

(v) See *Calvert on Parties*, 329; *Evans v. Jackson*, 8 Sim. 217; *Sand-*

Even where a mortgagee, claiming under the seller, is not willing to convey to the purchaser, without having competent authority for, so doing, he cannot be made a defendant to the purchaser's bill for a specific performance, nor can any person entitled to an interest in the equity of redemption, be joined. The mortgagee is only subject to be redeemed, and is a stranger to the contract, and has no right to dispute the title; and the purchaser has no right to redeem until his contract is completed. The purchaser of course, may, in a suit against the seller alone, if he is entitled to the equity of redemption, compel him to redeem, and to obtain a conveyance from the mortgagee.

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Purchaser of one lot, when a necessary party to suit in respect of another lot.

However, where, at a sale by auction, it was arranged that a portion of lot A. should be sold as part of lot B., it was, on a bill being filed by the purchaser of lot A. for specific performance according to the particulars, held, that the purchasers of lot B. were necessary parties, upon the special ground, that the vendor ought not to remain exposed to another suit by the purchaser of lot B. for specific performance according to the arrangement at the sale.(w)

Agent must be a party if contract under seal.

If the contract were entered into by an agent, and were under seal, the other party may insist upon the agent being included in any suit for specific performance by the principal: inasmuch as the performance of the covenant with the principal would be no defence to an action at law by the agent.(x)[1]

When to be made a party, if contract not under seal.

Generally, however, the contract is not under seal; but, even then, if the agency be not apparent on the contract, the nominal contractor should (unless the plaintiff can prove the agency) be made a party to the suit, as a defendant,(y) in order to bind his apparent interest;(z) and, although an action at law might, in such a case, be maintained by either agent or principal, if a bill be filed, the parties beneficially interested in the contract must be parties to the suit.(a) So, an auctioneer is frequently

[\*468]

Auctioneer, when and

ers v. *Richards*, 2 Coll. 568; and see Lord Langdale's remark as to the judgment creditors in *Lord Leigh v. Lord Ashburton*, 11 Beav. 474.

(w) *Mason v. Franklin*, 1 Y. & C. C. C. 239.

(x) See *Cooke v. Cooke*, 2 Vern. 36; *Cope v. Parry*, 2 Jac. & W. 538.

(y) See and consider *Fulham v. M'Carthy*, 1 H. L. C. 703.

(z) 1 Dan. Ch. P. by H. 205; *Taylor v. Salmon*, 4 Myl. & Cr. 134; and see *Nelthrope v. Holgate*, 1 Coll. 217, 218; where it was held that an agent might join as co-plaintiff.

(a) *Small v. Athwood*, 1 Younge, 457; the words "suit" and "contract" in lines 10 and 11, should evidently be transposed.

[1] A general agent for the sale of lands is not responsible for the non-performance of a contract made by an authorized sub-agent without his knowledge. *Boyd v. Vanderkemp*, 1 Barb. Ch. Rep. 273. An agent of a vendor is not a proper party to a bill by a purchaser against a vendor for the specific performance of a contract for the sale of land. *Ib.* Unless he is chargeable with fraud or notice. *Ib.* If improperly made a defendant, he is not liable for costs, although he suffered the bill to be taken *pro confesso* against him. *Ib.*

made a co-plaintiff with the vendor, upon the ground either of his having an interest in the contract, or of his liability to an action for the deposit.(b)[1] But, if the agent has no interest in the contract or the subject-matter thereof, and is under no liability in respect of the contract, he is an improper party to the suit.(c)

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why made a party.

Agent, when an improper party.

If the vendor die before completion, his personal representatives, as being entitled to the purchase-money, are *prima facie* the proper plaintiffs; if the personal estate has been vested in trustees under an order of the court, and a bill is filed by such trustees, the personal representative is still a necessary party;(d) and unless the plaintiffs have power to convey the vendor's interest in the estate,(e) the person in whom the same is vested, or who has power to convey it, must also be made a party;(f) but if there are devisees, or if the executors are empowered to sell, the heir is said to be an unnecessary party,(g) as the purchaser has no right to insist on proof of the will against the heir (h)[2] however, in a recent case, although

Death of vendor—who then entitled to sue purchaser, and who are proper parties to suit.

Heir, when an unnecessary party.

(b) See Dan. Ch. P. by H. 205, 207.

(c) *King of Spain v. Machado*, 4 Russ. 225, 240; *Kingsley v. Young*, cited Daniell's Ch. P. by H. 207.

(d) See *Cave v. Cork*, 2 Y. & C. C. C. 130, 133.

(e) *I. e.*, the estate, whether legal or merely equitable, which the vendor held subject to the contract; see *Roberts v. Marchant*, 1 Ha. 547.

(f) *Roberts v. Marchant*, 1 Ha. 547.

(g) See Calvert on Parties, 327.

(h) *Colton v. Wilson*, 3 P. Wms. 192; *Bellamy v. Liversidge*, Sug. 464; and see *Morrison v. Arnold*, 19 Ves. 673.

[1] It is to be observed that the common case of joining an auctioneer, and the vendor in a bill against a purchaser, is no exception to the general rule, because the auctioneer has an interest in the contract, and may bring an action upon it; he is also interested in being protected from the legal liability which he has incurred in an action by the purchaser to recover the deposit.

[2] In this case, the purchaser was in the first instance discharged from his purchase on account of the will not being proved against the heir at law; but on a re-hearing, he was compelled to take the title. But this decree was made on the particular circumstances of the case, and the point was not settled. In *Bellamy v. Liversidge*, however, the title was upheld, although the will was not proved against the heir at law; and upon exceptions to the master's report, on that account, coming on, Lord Kenyon, then master of the rolls, overruled them. It is not unusual to

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[\*469] special circumstances, tending to impeach the validity of the will, were held to entitle the purchaser to this protection, it does not appear to have been considered that the heir should have been made a party; but the cause stood over \*that the vendor might file a bill against him to establish the will.(i) If the vendor have devised the estate in strict settlement, the trustees, the persons (if any) in whom the first estate of inheritance is vested,(k) and the intermediate tenants for life,(l) and the owners (if ascertained) of any intermediate contingent or executory estates,(m) must be made parties.

Who in such case are proper parties to purchaser's bill.

So, the personal representatives of the vendor, and the persons who have power to convey his estate, are the proper parties to a purchaser's bill.(n)

Alienation of vendor's interest by act *inter vivos*—who are proper parties to suit either against or by purchaser.

So, if the vendor have, by act *inter vivos*, assigned his interest under the contract, he, or, if he be dead, his personal representative, must be a party to the assignee's bill as defendant; or, if such interest be recoverable *at law*, either as defendant or as co-plaintiff;(o) so, if subsequently to the contract, the vendor have aliened or incumbered the estate contracted, for the weight of authority seems to show that 'the alienees or incumbrancees, if they took

(i) *Grove v. Bastard*, 2 Phill. 619; the heir appears to have been made a defendant in *Colton v. Wilson*, 3 P. Wms. 192.

(k) *Hopkins v. Hopkins*, 1 Atk. 590.

(l) *Gore v. Stackpoole*, 1 Dow. 18, 31.

(m) Dan. Ch. P. by H. 263.

(n) See Calv. on Part. 327.

(o) See *Fulham v. M'Carthy*, 1 H. L. C. 703, 722; Dan. Ch. P. by H. 208; *Ryan v. Anderson*, 3 Madd. 174; and see 5 Ha. 554; *Padwick v. Platt*, 11 Beav. 503.

require the heir at law to join in the conveyance, if his concurrence can be easily obtained; and where he is a party to a conveyance in any other character, he is invariably made a conveying party in his character of heir at law; although, in strictness, this could not be insisted upon. If it should be thought that a modern will must be proved against the heir at law, yet it seems clear that equity would not compel the vendor, at the suit of the purchaser, to prove the will *per testes*. The objection, therefore, under any construction, could only be set up by a purchaser, as a defence to a specific performance; and even to that extent, it would not now prevail.

with notice of the contract, may be made defendants to the purchaser's bill.<sup>(p)</sup>[1] Ch. XVII.

When the estate is vested in trustees in trust to sell and pay the proceeds to specified persons with power to give receipts, the *cestuis que trust* are not necessary parties to the suit.<sup>(q)</sup>[2] *Cestuis que trust*, when unnecessary parties.

If the purchaser die before completion, his heir or devisee, <sup>[\*470]</sup> (if the estate be one of inheritance,) is the party entitled to sue for specific performance, making the personal representatives parties, if he seek payment of the purchase-money out of the personal estate;<sup>(r)</sup> so, on a bill filed by the vendor, the heir or devisee of the pur- Death of purchaser—who are entitled to sue vendor, and who are proper parties to suit.

<sup>(p)</sup> See *Daniels v. Davison*, 16 Ves. 249; *Echcliff v. Baldwin*, ib. 267; *Spence v. Hogg*, 1 Coll. 225; *Collett v. Hover*, ib. 227; *Potter v. Sanders*, 6 Ha. 1; Dan. Ch. P. by H. 233; but see *contra*, *Cutts v. Thodey*, 1 Coll. 223; Calv. on Part 325.

<sup>(q)</sup> *Wakeman v. Duchess of Rutland*, 3 Ves. 233; *Binks v. Lord Rokeby*, 2 Madd. 227.

<sup>(r)</sup> *Broome v. Monck*, 10 Ves. 597; *Buckmaster v. Harrop*, 13 Ves. 456; *vide supra*, 125, 126, and n. (s.) *ibid*.

[1] In the case of *Daniels v. Davison*, to which reference is made in the text, a seller had, after a contract for sale, sold at an advance to another person. The bill filed by the first purchaser prayed, that if the second purchaser bought without notice, the seller might account to the plaintiff for the advanced price. It was not necessary to decide the point; but Lord Eldon observed, that the estate by the first contract becoming the property of the vendee, the effect was, that the vendor was seized as a trustee for him; and the question then would be, whether the vendor should be permitted to sell for his own advantage the estate of which he was so seized in trust, or should not be considered as selling it for the benefit of that person for whom, by the first agreement, he became trustee, and therefore, liable to account. The ultimate decision was, that the first purchaser was entitled to a specific performance against the seller, and the second purchaser, the latter being considered to take subject to the equity of the first purchaser, to have a conveyance of the estate at the price which he agreed to pay for it.

[2] The case of *Wakeman v. Duchess of Rutland*, is not authority that *cestuis que trust* of money to be produced by the sale of estates devised to trustees to sell, cannot, in any instance, be required to covenant for the title. Where the money to arise by sale of the estate is absolutely given to two or more persons, they are substantially owners of the estate, and must accordingly covenant for the title. So, even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title.

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Or to suit  
by vendor.

Alienation  
of purcha-  
ser's interest  
by act *inter  
vivos*—who  
are proper  
parties to  
suit, by or  
against ven-  
dor.

Purchaser  
not to be a  
party if his  
assignee has  
been accept-  
ed by ven-  
dor.

Suit may be  
commenced  
by will or  
claim.

chaser is a necessary party to the suit; (s) so, if the bill be filed against the heir or devisee of the purchaser, the personal representatives must be made parties, because the purchase-money is primarily payable out of the personal estate. (t) [1]

If the purchaser have assigned the benefit of the contract, the suit against the vendor for specific performance should, it would seem, be by the assignee; (v) making the purchaser a defendant; if, however, the purchaser merely enter into an ordinary agreement for a sub-purchase, agreeing himself to convey the estate, and not that the original vendor shall convey it, such sub-purchaser is not a necessary party to a suit for the performance of the original contract. (w)

And where the purchaser's assignee has been accepted in his place by the vendor, the original purchaser should not be made a party to the vendor's suit. (x)

(5.) *As to the bill.*

A suit for specific performance may now be commenced by bill or by claim under the orders of 22d April, 1850;

(s) *Twissend v. Champenowne*, 9 Pri. 130.

(t) Dan. Ch. Pr. by H. 278.

(v) See *Fulham v. M'Carthy*, 1 H. L. C. 703, 717; *Padwick v. Platt*, 11 Beav. 503; but see *Nelthorpe v. Holgate*, 1 Col. 203; *Moxhay v. Inderwick*, 11 Jur. 837.

(w) See *Anon. v. Walford*, 4 Russ. 372.

(x) *Holden v. Hayn*, 1 Mer. 47; *Hall v. Laver*, 3 Y. & C. 191; see *Hemingway v. Fernandes*, 13 Sim. 228.

[1] If the personal estate is insufficient to perform the contract, and the agreement is, on that account, rescinded, yet the heir or devisee will, it should seem, be entitled to the personalty, as far as it extends. And it has been decided, that if, by reason of the complication of the testator's affairs, the purchase money cannot be immediately paid, and the vendor, for that reason, rescinds the contract, yet, on the coming in of the assets, the devisee of the estate contracted for may compel the executor to lay out the purchase-money in the purchase of other estates for his benefit. But if the heir, not being entitled to have the estate paid for out of the personal estate, actually obtain and apply the personal estate in payment of the purchase-money; the persons entitled to the personal estate will not be entitled to the lands, but only to a charge on it for the amount of the money wrongly applied.



these orders(y) are not compulsory, but their practical effect will, probably be, to supersede to a considerable extent the old form of proceeding; they do not, however, seem to be in their present form adapted to cases involving complicated and disputed matters of fact.

Assuming that the suit be commenced by bill;—if the bill state that the agreement was in writing, it need not allege signature;(z)[1] nor that it was duly stamped;(a) nor is it clearly necessary to allege that the agreement was in writing, (supposing such to be the fact;)(b) although either the writing and signature, or special circumstances taking the case out of the statute of frauds, must be proved at the hearing.

Where letters are relied upon, they may be stated in the bill, either as constituting the agreement, or as evidence of a parol agreement; in the latter case, it will be necessary to prove other matter sufficient to take the case out of the statute.(c)[2]

As a general rule, the bill need not state inferences or results of law arising from the facts alleged; it has, however, been held by V. C. K. Bruce in two recent cases, that where the vendor means to rely on the purchaser's waiver of his *prima facie* right to a marketable title, he must allege or charge such waiver; and that it is not sufficient to allege facts which, if proved, would be evi-

(y) The effect of which is stated *infra*, p. 473, *et seq.*

(z) *Rist v. Hobson*, 1 S. & S. 543; *Field v. Hutchinson*, 1 Beav. 599.

(a) 1 Dan. Ch. Pr. by H. 347.

(b) See *Spurrier v. Fitzgerald*, 6 Ves. 548; 1 S. & S. 543; 1 Dan. Ch. Pr. by H. 347; but see *Redding v. Wilkes*, 3 Bro. C. C. 400.

(c) See *Birce v. Bletchley*, 6 Madd. 17; *Skinner v. M<sup>r</sup> Douall*, 2 De G. & S. 265.

[1] Although the agreement must be signed, yet it need not be so averred in a bill for a specific performance; for the writing, unless signed, would not be an agreement, and as the allegation in the bill, of course, is, that there is an agreement in writing, the signature must be presumed, until the contrary is shown.

[2] In the first case, the defendant may insist that they do not make out a concluded agreement, and no extrinsic agreement can be received; in the latter, he may plead the statute of frauds.

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and facts  
supporting  
it should be  
stated.

[\*472]

Prayer for  
general  
relief, what  
relief can be  
obtained  
under.

dence of waiver ;(d) but, on the other hand, it is improper to introduce general charges or averments of waiver, &c. unsupported by a statement of the particular facts ; the \*party ought so to frame his case upon the record, that the court can fairly see what the case is which is to be relied on.(e)

The plaintiff cannot, under the prayer for general relief, obtain a decree inconsistent with either the specific case made, or the specific relief prayed by the bill ;(f) for instance, a vendor who, through want of his title, fails to obtain a decree for specific performance against a purchaser in possession, cannot, under the prayer for general relief, obtain an account of the rents and profits ; although the defendant by his answer state his readiness to pay a fair rent ;(g) nor, where he fails in proving the agreement alleged by his bill, can he, in general, take a decree for performance of a different agreement admitted by the defendant's answer ;(h) nor can he, under the general prayer, obtain relief which, although consistent with the specific relief, is yet sustained only by allegations which have been introduced merely as showing his right to the specific relief ;(i) and, in general, where a bill is filed making a case of actual fraud, and such fraud is disproved or not established, the court will not allow the bill to be used for any secondary purpose, but will dismiss it with costs.(k)[1]

(d) *Clive v. Beaumont*, 1 De G. & S. 397 ; and *Gaston v. Frankum*, 2 De G. & S. 561.

(e) See *Hunter v. Daniel*, 4 Ha. 432.

(f) See authorities cited in the four next notes, and see *Hiern v. Mill*, 13 Ves. 119 ; *Cockerell v. Dickens*, 1 Mon. D. & De G. 45, 81, Priv. C.

(g) *Williams v. Shaw*, 3 Russ. 178, n.

(h) *Legal v. Miller*, 2 Ves. sen. 299 ; but see *Mortimer v. Orchard*, 2 Ves. jun. 244 ; and *Hanbury v. Litchfield*, 2 Myl. & K. 629 ; in which, under special circumstances, the plaintiff obtained a decree.

(i) *Stevens v. Guppy*, 3 Russ. 171, 185.

(k) *Glascott v. Lang*, 2 Ph. 310, 322 ; and see *Wilde v. Gibson*, 1 H. L. C. 621.

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[1] *Bank of United States v. Schultz*, 3 Ham. Rep. 62 ; *Knox v. Smith*, 4 How. 298 ; *M Cosker v. Brady*, 1 Barb. Ch. Rep. 329 ; *Jenkins v. Eldridge*, 3 Story's Rep. 183 ; *Brooks v. Byam*, 1 Story's Rep. 301 ; per Story,

\*(6.) *As to proceeding by claim under the orders of April, 1850.*

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Under the orders of April, 1850, any person seeking equitable relief may, without special leave of the court, and instead of proceeding by bill in the usual form, file a claim in the record and writ clerks' office, in (among other specified cases,) any case where the plaintiff is, or claims to be, a person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance; such claim to be in the form and to the effect of the form No. 8 set forth in the schedule A. to the said orders; and the filing of such claim is to have the force and effect of filing a bill; (l) and in any case in which the above form is not applicable, the court may, upon the *ex parte* application of the plaintiff, and upon reading the claim proposed to be filed give a leave to file it. (m)

Proceedings by claim under the orders of April, 1850.

Special claim.

Upon filing the claim, the plaintiff may sue out a writ of summons to the defendant, requiring him to cause an appearance to be entered, and also requiring him on a day or time to be therein named, or on the seal or motion day then next following, to show cause, if he can, why

Writ of summons

(l) See Orders 1 and 2.

(m) Order 6.

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J.; *Strange v. Watson*, 11 Ala. Rep. 324; 5 Port. Rep. 26; *Collon v. Ross*, 2 Paige, 396; *Foster v. Cook*, 1 Hawks, 509; *Lloyd v. Brewster*, 4 Paige, 537; *Lingan v. Henderson*, 1 Bland, 252; *Chalmers v. Chambers*, 6 Har. & Johns. 29; *Allen v. Coffman*, 1 Bibb, 469; *Shepherd's ex'r. v. Clarke*, 3 Munf. 29; 1 Munf. 554; *Robinson v. M<sup>r</sup> Arthur's heirs*, 6 Peters, 182; *Butler v. Durham*, 2 Kelley's Rep. 414; *Chalmers v. Chambers*, 6 Har. & Johns. 29; *Smith v. Trenton Del. Falls Co.* 3 Green's Ch. Rep. 505; *Traip v. Gould*, 3 Maine Rep. 82; *Martin v. Broadus*, Freeman's Ch. Rep. 35; *Williamson v. Raney*, Freeman's Ch. Rep. 112; *Pennington v. The Governor*, 1 Blackf. 87; *Taliaferro v. Foote*, 3 Leigh, 58; *Pearl's heirs v. Taylor*, 2 Bibb, 556; *M<sup>r</sup> Intyre v. Trustees of Union College*, 6 Paige, 239; *Wilkin v. Wilkin*, 1 Johns. Ch. Rep. 111; *Allen v. Coffman*, 1 Bibb, 359; *Cook v. Mancius*, 5 Johns. Ch. Rep. 89; *Franklin v. Osgood*, 14 Johns. Rep. 527; *English v. Foxall*, 2 Peters, 595; *Bailey v. Burton*, 8 Wend. Rep. 339; *Miller v. Lord*, 11 Pick. 11; *Brown v. M<sup>r</sup> Donald*, 1 Hill, 302; *Smith v. Smith*, 4 Rand. 95; *Muston v. M<sup>r</sup> Clarty's heirs*, 3 Litt. 274; *Lingan v. Henderson*, 1 Bland, 251; *Thompson v. Smithson*, 7 Porter, 144.

Ch. XVIII. such relief as is claimed by the plaintiff should not be had ; or why such order as shall be just with reference to the claim should not be made ;(n) the time named for showing cause is to be fourteen days, at the least, after service of the writ ; but, by consent of the parties, and with the leave of the court, cause may be shown on any earlier day.(o)

Who to be  
named de-  
fendant.

[\*474]

Showing  
cause.

The only person who need be named in the writ of \*summons, as defendant to the suit in the first instance, is the person against whom relief is directly prayed.(p)

At the time named in the writ for showing cause, or on the seal or motion day then next following, or so soon after as the case can be heard, the defendant, having previously appeared, is personally or by counsel, to show cause in court, if he can, (and, if necessary, by affidavit),(q) why such relief as is claimed by the claim should not be had against him.(r)

Hearing and  
order there-  
on.

At the time appointed for showing cause, upon the motion of the plaintiff, and on hearing the claim, and what may be alleged on the part of the defendant, or upon reading a certificate of the appearance being entered by the defendant, or an affidavit of the writ of summons being duly served, the court may, if it shall think fit, make an order granting or refusing the relief claimed, or directing any accounts or inquiries to be taken or made, or other proceedings to be had for the purpose of ascertaining the plaintiff's title to the relief claimed ; and the court may direct such (if any) persons or classes of persons as it shall think necessary or fit to be summoned or ordered to appear as parties to the claim, or on any proceedings before the master, with reference to any accounts or inquiries directed to be taken or made, or otherwise.(s)

(n) See Orders 5, 6.

(o) Order 11.

(p) Order 8.

(q) It is understood that in practice the plaintiff is allowed to file affidavits in reply.

(r) Order 12.

(s) Order 13.

Every order to be so made is to have the effect of, and may be enforced as a decree or decretal order made in a suit commenced by bill, and duly prosecuted to a hearing, according to the previous course of the court.<sup>(t)</sup>

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Effect of order.

If, upon the application for any such order, or during any proceedings under any such order when made, it shall \*appear to the court that, for the purposes of justice between the parties, it is necessary or expedient that a bill should be filed, the court may direct or authorize such bill to be filed, subject to such terms as to costs or otherwise as may be thought proper.<sup>(u)</sup>

Court at hearing may direct bill to be filed.

[\*475]

The orders made for granting relief in the several cases to which the forms set forth in schedule A. are applicable, may, if the court thinks fit, be in the form and to the effect set forth in schedule C. as applicable to the particular case, with such variations as circumstances may require.<sup>(v)</sup>

Form order.

If any of the cases enumerated in Order I., involve, or are attended by, such special circumstances affecting either the estate or the personal conduct of the defendant, as to require special relief, the plaintiff is at liberty to seek his relief by bill, as if the orders had not been made.<sup>(w)</sup>

Plaintiff may under special circumstances, proceed by bill.

If any suit, for any of the purposes to which the forms set forth in schedule A. are applicable, shall be commenced by bill and prosecuted to a hearing in the usual course, and, upon the hearing, it shall appear to the court that an order to the effect of the decree then made, or an order equally beneficial to the plaintiff, might have been obtained upon a proceeding by summons in the manner authorized by the orders, the court may order the increased costs occasioned by proceeding by bill, beyond the costs which would have been sustained in proceeding by summons, to be paid by the plaintiff.<sup>(x)</sup>

As to extra costs occasioned by unnecessarily proceeding by bill instead of claim.

(t) Order 14.

(u) Order 15.

(u) Order 15.

(v) Order 16.

(w) Order 31; that is, without incurring any special liability to costs.

(x) Order 32.

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In what cases  
orders apply.

[\*476]

It has been decided, (y) that the above orders do not extend to injunction suits: and the form of claim given in schedule A. seems adapted only to cases where the plaintiff relies on a written agreement, (the documents constituting \*which, must, if not admitted, be produced and proved at the hearing.) (yy) And the 1st order has been held not to include a claim for specific performance of an agreement to grant (z) or take (a) a lease; although it may be filed by special leave under the 6th order; but, a claim for specific performance of a contract for purchase against the executors and devisee of the purchaser, claiming specific performance and costs, and in default, an administration of the purchaser's personal estate for the benefit of the plaintiff and creditors generally, and that, if plaintiff should not thus be fully paid, he might be declared to have a lien on the estate, and that it might, if necessary, be sold, has been held not to require leave; (b) nor is leave necessary where, the title having been accepted, the purchaser refuses, on some collateral ground, to complete. (c) *V. C. K. Bruce* has evinced a disposition to put a wide construction upon the orders; but the prevalent opinion seems to be, that they are, in the present shape, adapted only to clear and simple cases. (d)

(7.) *As to how the plaintiff's case may be sustained in the absence of a written agreement:—fraud,—part-performance:—admission by defendant of parol agreement:—parol variation of written agreement.*

Written  
agreement,  
when dispensed  
with,on the ground  
of fraud.

Although in general there must, in order to sustain a suit for specific performance, be a contract in writing within the statute of frauds, the courts, in certain cases, decree specific performance of a parol agreement, upon the ground, 1st, of fraud having been the cause of the

(y) *Holden v. Chalcraft*, 14 Jur. 846.

(yy) See *Scargill v. Hurry*, 14 Jur. 847; *Marshall v. Davies*, 14 Jur. 997, V. C. R.

(z) *Keeble v. Dennish*, 14 Jur. 847.

(a) *Scargill v. Hurry*, *ibid.*

(b) *Nottingham v. Mould*, 16 L. T. 122, V. C. K. B.

(c) *Hemming v. Mayo*, 14 Jur. 847.

(d) See *Jackson v. Grant*, Times 23rd Nov. 1850, 41 L. O. 79, V. C. R.

non-compliance with the requisitions of the statute: 2ndly, of \*the parol agreement having been in part performed, or 3rdly, of its existence being admitted by the defendant.(e)

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Part performance or defendant's admission.

1st. If by fraud the defendant has prevented a compliance with the requisitions of the statute, this will not avail him, but the plaintiff will be entitled to relief on proving the fraud and the parol contract.(f)[1]

Fraud takes the case out of the statute.

2ndly. As to acts of part performance sufficient to take a case out of the statute of frauds.—It is, in general, of the essence of such an act, that the court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal

Part performance—what acts of are sufficient to take the case out of statute.

(e) As to the distinction between agreements and declarations of trust, see *Dale v. Hamillon*, 2 Ph. 266, 275.

(f) See note to *Pym v. Blackburn*, 3 Ves. 38, and cases there collected.

[1] Where the agreement is intended by the parties to be reduced to writing, according to the statute, but it is prevented from being done by the fraud of one of the parties, courts of equity have said that the agreement shall be specifically executed; for, otherwise the statute designed to suppress fraud would be the greatest protection to it. Hence, if one agreement in writing should be proposed and drawn, and another should be fraudulently and secretly brought in and executed in lieu of the former, equity would relieve. So, if a man should treat for a loan of money on mortgage, and the conveyance is to be by an absolute deed of the mortgagor, and a defeasance by the mortgagee; and, after the absolute deed is executed, the mortgagee fraudulently refuses to execute the defeasance, equity will decree a specific performance. So, if instructions are given by an intended husband, to prepare a marriage settlement, and he promises to have the settlement reduced to writing, and then fraudulently and secretly prevents it from being done; and the marriage takes effect, in consequence of false assurances and contrivances, a specific performance will be decreed. So, where a father has purchased lands in fee, and on his death-bed told his eldest son that the lands were purchased with his second son's money, and that he intended to give them to him; and the eldest son promised that he should enjoy them accordingly; and the father died; and the eldest son refused to comply with his promise: it was held, that the promise should be specifically performed, on the ground of fraud, notwithstanding the objection that there ought to have been a declaration of the use or trust under the statute. See 2 Story's Eq. Juris., s. 768.

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rights, they would be in if there were no contract ;(g) for instance, delivery of possession is a sufficient part performance on the part of the vendor to sustain his suit against the purchaser ;(h) and the acceptance of possession is a sufficient part performance, on the part of the purchaser, to sustain his suit against the vendor : (i) the fact of the purchaser being, without liability to a charge of trespass, in possession of the vendor's land, is considered as showing unequivocally that some contract has taken place between the litigant parties ;(j) and the court will then receive parol evidence of the terms of such contract. So, the retention of possession by a tenant after the determination of the original tenancy, may, under special circumstances, amount to part performance : (k) so, if a tenant in possession lay out money on the premises, upon the faith of the parol agreement, (l) or, it is conceived, commits acts \*which would, (if he were merely tenant,) subject him to the loss of his lease, (m) or to proceedings on the part of the landlord : (n) so, it has been held, that the mere payment of additional rent entitles the tenant to an answer from the landlord as to the existence of an agreement for a renewed lease, although the court intimated an opinion against the admissibility of parol evidence in opposition to the answer. (o) [1]

(g) *Per V. C. Wigram*, in *Dale v. Hamilton*, 5 Ha. 381.

(h) *Pyke v. Williams*, 2 Vern. 455 ; *Buckmaster v. Harrop*, 13 Ves. 456 ; *Reynolds v. Waring*, You. 351, 353.

(i) *Clinan v. Cooke*, 1 Sch. & Lef. 41 ; *Gregory v. Mighell*, 18 Ves. 328 ; *Morphett v. Jones*, 1 Sw. 172.

(j) *Per V. C. Wigram*, 5 Ha. 381.

(k) *Dowell v. Dew*, 1 You. C. C. C. 345.

(l) *Wills v. Stradling*, 3 Ves. 382 ; *Mundy v. Jolliffe*, 5 Myl. & Cr. 167 ; *Sutherland v. Briggs*, 1 Ha. 26.

(m) See and consider *Parker v. Smith*, 1 Coll. 608.

(n) See 5 Myl. & Cr. 177 ; and *Sutherland v. Briggs*, *ubi supra*.

(o) *Wills v. Stradling*, 3 Ves. 378, 382.

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[1] Where one party has executed his part of the agreement, in the confidence that the other party would do the same, if the latter refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice. It is sometimes difficult to ascertain what is to be deemed a part performance so as to extract the case from the reach of the statute. It was formerly thought that a deposit or security, or payment of the purchase-mo-



And when the parties have for many years acted upon the assumption that a contract existed, acts which might not in themselves, and irrespectively of the lapse of time

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ney, or a part of it, or at least of a considerable part of it, was such a part performance as took the case out of the statute. "But that doctrine," says Story, (2 Story's Eq. Juris., s. 760,) "was open to much controversy, and is now finally overthrown." "In order," continues Story, (Ib. s. 762,) "to make the acts such as a court of equity will deem part performance of an agreement within the statute, it is essential that they should clearly appear to be done solely with a view to the agreement being performed. For, if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement. On this account, acts merely introductory, or ancillary to an agreement, are not considered as a part performance thereof, although they should be attended with expense. Therefore, delivering an abstract of title, giving directions for conveyances, going to view the estate, making valuations, ad-measuring the lands, registering conveyances, and acts of the like nature are not sufficient to take the case out of the statute. They are all preliminary proceedings, and are, besides, of an equivocal character, and capable of a double interpretation; whereas, acts, to be deemed a part performance, should be so clear, certain, and definite in their object and design, as to refer exclusively to a complete and perfect agreement, of which they are a part execution. In like manner, the mere possession of the land contracted for, will not be deemed a part performance, if it be obtained wrongfully by the vendee, or if it be wholly independent of the contract. Thus, if the vendee enter into possession, not under the contract, but in violation of it, as a trespasser, the case is not taken out of the statute. So, if the vendee be a tenant in possession under the vendor; for his possession is properly referable to his tenancy, and not to the contract. But, if the possession be delivered and obtained solely under the contract; or if, in case of a tenancy, the nature of the holding be different from the original tenancy, as by the payment of a higher rent, or by other unequivocal circumstances, referable solely and exclusively to the contract, there the possession may take the case out of the statute. Especially will it be held to do so where the party let into possession has expended money in building, or repairs, or other improvements; for, under such circumstances, if the parol contract were to be deemed a nullity, he would be liable to be treated as a trespasser; and the expenditures would not only operate to his prejudice, but be the direct result of a fraud practised upon him. But, in order to take a case out of the statute, upon the ground of part performance of a parol contract, it is not only indispensable that the acts done should be clear and definite, and referable exclusively to the contract; but the contract should also be established by competent proofs, to be clear and unequivocal in all its terms. If the terms are uncertain or ambiguous, or not made out by satisfactory proofs, a specific performance will not be decreed."

Ch. XVIII. have been sufficient to take the case out of the statute, have been held to have that effect.(p)

What are insufficient.

[\*479]

As to expenditure by tenant.

But there can be no part performance of an incomplete contract:(q) and an act which, though in truth done in performance of a contract, admits of explanation without supposing a contract, is not, in general, sufficient to take the case out of the statute:(r) *e. g.*; delivery of the abstract, or giving directions for the conveyance, is insufficient:(s) so, also, is payment of a sum alleged to be purchase-money;(t) or procuring, and paying a valuable consideration for, a release by a third party;(u) or the mere retention of possession by a tenant after the determination of his tenancy, but before notice to quit;(v) or an expenditure \*by the tenant to which he is liable under the terms of his lease:(w) so, possession obtained wrongfully by the plaintiff, of course, cannot avail him:(x) marriage, it may be remarked, is not, for the purposes of specific performance, considered as a part performance of a parol contract for which it forms the consideration.(y)

So, if, in the case of moneys expended by a tenant, the circumstances were such as would, if there were no contract for sale, enable him to recover the amount from the landlord, the case would not appear to be different in principle from that of payment of purchase-money; the same remark applies to the case of the payment of additional rent;(z) where, however, as we have seen, the de-

(p) *Blackford v. Kirkpatrick*, 6 Beav. 232.

(q) *Lady Thynne v. Earl Glengall*, H. L. C. 131, 158; and see *Parker v. Smith*, 1 Coll. 623.

(r) 5 Ha. 381.

(s) Sug. 140; *Whaley v. Bagnel*, 1 Bro. P. C. 345; *Hole v. White*, 1 Bro. C. C. 409 (cited); *Thomas v. Blackman*, 1 Coll. 301.

(t) *Clinan v. Cooke*, 1 Sch. & Lef. 40; *Wall v. Evans*, 4 Y. & C. Ex. 579; and see 5 Ha. 381.

(u) *O'Reilly v. Thompson*, 2 Cox, 271.

(v) *Wills v. Stradling*, 3 Ves. 381; *Brennan v. Bolton*, 2 Dru. & War. 349.

(w) *Frame v. Dawson*, 14 Ves. 386.

(x) Sug. 141; *Hole v. White*, 1 Bro. C. C. 409, cited.

(y) *Dundas v. Dulens*, 1 Ves. jun. 159; *Lassence v. Tierney*, 1 Mac. & G. 572.

(z) *Wills v. Stradling*, 3 Ves. 378.

cision was, that the landlord who had pleaded the statute should answer. Ch. XVIII.

In the modern case of *Mundy v. Jolliffe*,<sup>(a)</sup> the defendant, in pursuance of the parol agreement for a lease, had laid down a field in pasture, and executed draining and repairs; acts which are referred to by Sir J. Wigram, V. C.,<sup>(b)</sup> as "certainly equivocal;" the bill was dismissed by Sir L. Shadwell, V. C., but this decision was reversed by Lord Cottenham, C., on appeal. His lordship, in giving judgment, indicated a willingness rather to extend than to contract<sup>(c)</sup> the jurisdiction: "Courts of equity," observed his lordship, "exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting the party to escape from the engagements he has entered into upon the ground of the statute of frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and with that object it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect what the terms of it really were."<sup>(d)</sup> [\*480]

In a modern case, where an agreement in writing for a three years' tenancy reserved to the tenant the option of requiring a twenty-one years' lease at the expiration of the prior term, V. C. Wigram appears to have considered that this verbal notice of intention to take the new lease, accompanied by retention of possession, was binding upon him.<sup>(e)</sup> Verbal notice and retention of possession by tenant, held to be a sufficient declaration of option to purchase.

In a late case, where a colliery proprietor, under the mistaken notion that he had a power of compulsorily purchasing land for the purpose of a railway, wrote to the Ejectment by land-owner restrained on ground of mere acqui-

(a) 9 Sim. 413; on appeal, 5 Myl. & Cr. 167.

(b) 5 Ha. 381.

(c) See Sug. 150.

(d) 5 Myl. & Cr. 177.

(e) *Bealson v. Nicholson*, 6 Jur. 620.

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existence in heavy expenditure by party in possession, although no agreement.

landowner, and, referring to such supposed power, offered to purchase the land at a fair valuation, and, no reply being given, the railway was made over the land without further communication with him, but with his full knowledge; and then, after a fruitless negotiation as to the price to be given for the land, the landowner commenced an ejectment upwards of three years after the railway had been finished; the same learned judge, on motion, restrained the action, upon the colliery proprietor giving judgment in the action, and paying into court the utmost valuation of the land.(f)

[\*481]

Plaintiff, how far bound to show precise terms of contract.

It seems to be clear, upon the modern authorities,(g) \*that the court, being satisfied of the existence of an agreement, will, if possible, ascertain the real terms: Sir *E. Sugden*, however, remarks that "the prevailing opinion requires the party seeking the specific performance in such a case to show the distinct terms and nature of the contract;"(h) and, in a case in Ireland, a reference was refused at the hearing, on the ground that the party setting up the agreement had not produced evidence which, if uncontradicted, would be sufficient to establish its essential terms; the court holding that a reference should be directed only in cases where the evidence is contradictory.(i) But it has been held, that where the bill states, as part of the agreement, a stipulation which would operate against the plaintiff, and which created a liability to which he would, in the absence of agreement, have been liable,—e. g., an agreement by an intended lessee to pay taxes and make necessary repairs),(k)—or which has been satisfied, and so rendered immaterial, so far as relates to

Immaterial terms of agreement, although stated in bill need not be proved;

(f) *Powell v. Thomas*, 6 Ha. 300.

(g) See *Allan v. Bower*, 3 Bro. C. C. 149; *Clinan v. Cooke*, 1 Sch. & Lef. 38; *Boardman v. Mostyn*, 6 Ves. 467, 471; *Morphett v. Jones*, 1 Sw. 172; *Price v. Assheton*, 1 Y. & C. Ex. 82; *Dale v. Hamilton*, 5 Ha. 381; *Mundy v. Jolliffe*, 5 Myl. & Cr. 167, 177; Sug. 147.

(h) Sug. 150; see *Price v. Assheton*, 1 Y. & C. Ex. 441.

(i) *Savage v. Carroll*, 1 Ball & B. 283, 550, 551; this case, however, was not one between vendor and purchaser; but the validity of the contract was discussed upon the collateral question, whether the heir of a purchaser who had died before completion was entitled to have the purchase-money paid out of the personal estate.

(k) *Gregory v. Mighell*, 18 Ves. 328.

anything remaining to be done,(l) the failure to prove such statement is unimportant. Ch. XVIII.

But if the final result of all the evidence which can be procured, is, to leave the material terms of the agreement doubtful, as where it remained uncertain whether the purchase-money did or did not include the timber, the court, of course, can make no decree:(m) the court, however, will endeavor to put a reasonable interpretation upon vague expressions in an agreement.(n)

the material terms must ultimately be clearly shown.

\*And it appears that, as a general rule, the plaintiff cannot rely upon any act by the defendant which can merely tend to his own prejudice, and not affect the plaintiff; e. g., payment of auction-duty by the purchaser;(o) or the execution and registration by the vendor of the conveyance.(p) Nor, in the case of a purchase of separate lots under separate parol contracts, does part performance as to one lot set up the agreement as to another lot.(q)

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Act by defendant, merely to his own prejudice, no part performance;

nor does part performance, as to one lot, affect another lot.

We may here remark, that sales by auction,(r) and in bankruptcy,(s) are both within the Statute of Frauds.

Sales by auction and in bankruptcy are within the statute.

3rd. Where the defendant, by his answer, admits the parol agreement as alleged in the bill, and does not claim the benefit of the statute, Equity will decree specific performance against himself, or, if he die before decree, against his representatives;(t)[1] so if he admit a different

Admission of agreement by defendant, and statute not insisted on.

(l) *Mundy v. Jolliffe*, 5 Myl. & Cr. 167, 176.

(m) *Reynolds v. Waring*, You. 346; in this case no reference appears to have been asked by the plaintiff.

(n) *Sanderson v. Cockermouth Railway Company*, 11 Beav. 497.

(o) *Buckmaster v. Harrop*, 13 Ves. 465; the particular case cannot again arise, the duty having, as is well known, been repealed.

(p) *Hawkins v. Holmes*, 1 P. Wms. 770.

(q) *Buckmaster v. Harrop*, 13 Ves. 456, 474.

(r) *S. C.*; *Blagden v. Bradbear*, 12 Ves. 466.

(s) *Ex parte Cutts*, 3 Dea. 267, Lord Cottenham.

(t) See *Attorney General v. Day*, 1 Ves. 221; Sug. 150; see *Parker v. Smith*, 1 Coll. 615.

[1] The reason for this decision, is, that the statute is designed to guard against fraud and perjury; and in such a case, there can be no danger of, that sort. The case then, is taken entirely out of the mischief intended to be guarded against by the statute. Another reason is, that the agreement, although originally by parol, is now, in part evidenced by writing under the signature of the party which is a complete compliance

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agreement from that alleged in the bill, the plaintiff may amend his bill and take the benefit of the admission ;(u) but, in any case, if relying on the admission, he is bound by its terms, and cannot vary them by parol evidence :(w) so, if the defendant, although admitting the agreement, insist upon the statute, no decree can be made against him ;(x)[2] but he cannot, after having admitted and sub-

(u) *Lindsay v. Lynch*, 2 Sch. & Lef. 9.

(w) *Pym v. Blackburn*, 3 Ves. 34.

(x) *Blagden v. Bradbear*, 12 Ves. 466 ; see *Moore v. Edwards*, 4 Ves. 23 ; *Cooth v. Jackson*, 6 Ves. 37 ; *Rowe v. Teed*, 15 Ves 375.

with the terms of the statute. If such an agreement were originally by parol, but it was afterwards reduced to writing by the parties, no one would doubt its obligatory force. Indeed, if the defendant does not insist on the defence, he may fairly be deemed to waive it. See 2 Story's Eq. Juris. sec. 755.

[2] Upon this question, there has been considerable difference of opinion. Lord Macclesfield expressly decreed a specific performance, where the parol agreement was confessed by the answer, and the statute of frauds was insisted on as a defence ; and Lord Hardwicke appears to have entertained the same opinion. " But later judges " says Story, 2 Story's Eq. Juris. sec. 757 ; " have expressed a strong dissatisfaction, with this opinion ; and it may now be deemed to be entirely overruled, and the doctrine firmly established, that even where the answer confesses the parol agreement, if it insists, by way of defence, upon the protection of the statute, the defence must prevail, as a competent bar. This doctrine seems conformable to the true intent and objects of the statute ; for it is difficult to perceive how a party can be legally bound by a contract which the statute declares to be invalid, when the party insists upon the objection, and does not submit to waive it. It has been forcibly said, by a great judge in equity, that it is immaterial what admissions are made by a defendant, who insist upon the benefit of the statute ; for he throws it upon the plaintiff to show, a complete written agreement ; and it can be no more thrown upon the defendant to supply defects in the agreement, than to supply the want of an agreement. The same doctrine, seems now fully recognized in America."

In Pennsylvania, it seems to be the settled rule, that although the defendant answer, and admit the agreement, as stated in the bill, he may nevertheless protect himself against the performance of it, by pleading the statute. *Thompson v. Tbd*, 1 Peters' Rep. 388. In South Carolina, the contrary rule has been adopted. *Smith v. Brailsford*, 1 Des. 350. On a bill for a specific performance of a parol agreement, for the sale of lands, in a case not tainted with fraud, if the defendant chooses to avail himself of the statute, he need not, by his answer, admit, or deny the agreement, the law having declared it void. *Givens v. Calder*, 2 Des. 171, 190 ; *Argenbright v. Campbell*, 3 Hen. & Munf. 144, 153, 160, 161 ;

mitted to perform the agreement, claim the benefit of the statute by his answer to the amended bill : (y) nor can he unite a \*plea of the statute with any other defence by answer : (z) in a late case, it appears to have been held by V. C. K. Bruce, that the defendant, denying the agreement, but omitting to claim the benefit of the statute by his answer, was not entitled to avail himself of it. (a) [1]

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The plaintiff, as a general rule, if suing on a written contract is bound by its terms, and cannot, upon the ground of fraud, surprise, or mistake, seek to vary, add to, or explain its contents : (b) except, perhaps, where the fraud consists in a refusal to accede to a promised variation upon the faith of which the plaintiff entered into a written agreement ; (c) or in a fraudulent preparation or alteration of the agreement so as to make it inconsistent with the real intention of the parties, and with the understanding of the plaintiff at the time he executed it ; or where, by mistake, an agreement not expressing the real intention of the parties, is entered into, and the mistake is admitted by the answer, or, not being denied by the answer, is proved by unexceptionable evidence. (d) A

Purchaser cannot, in general, enforce specific performance of a written contract with a parol variation.

A subsequent parol

(y) *Spurrier v. Fitzgerald*, 6 Ves. 548.

(z) *Cooth v. Jackson*, 6 Ves. 12.

(a) *Skinner v. M'Dowall*, 2 De G. & S. 265.

(b) *Marquis of Townshend v. Slangroom*, 6 Ves. 328 ; *Cloves v. Higginson*, 1 Ves. & B. 524.

(c) *Pember v. Mathers*, 1 Bro. C. C. 52, 54 ; Sug. 188 ; but see *Clarke v. Grant*, 14 Ves. 519, 525, *et quere*.

(d) See note to *Pym v. Blackburn*, 3 Ves. 38, and cases as to fraud there cited ; Lord Thurlow's judgment in *Lord Ingham v. Child*, 1 Bro. C. C. 94 ; Lord Eldon's remarks, 6 Ves. 339 ; Sir John Leach's argument as

*Grant v. Craigmiles*, 1 Bibb, 203. In Virginia it has been determined, that if the defendant by his answer admit that certain goods were to be charged to him, upon certain conditions there being no other evidence in the case, such admission ought to be the rule by which the charge should be regulated. *Kerr v. Love*, 1 Wash. Rep. 172.

[1] It has been held in Kentucky, that although the defendant omit to plead the statute of frauds, a specific performance will not be decreed, unless he confess the agreement. *Fowler v. Lewis*, 3 Marsh. Rep. 445. The contract admitted by the answer, or proved by the evidence must not essentially vary from the contract set forth in the bill ; unless they correspond, a specific performance will not be decreed. *Harris v. Knickerbocker*, 5 Wend. 638.

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variation  
can only be  
enforced if  
part per-  
formed.  
[\*484]

*subsequent* parol variation cannot be enforced by the plaintiff, (e) unless there has been such a part performance of the varied agreement as would support a decree in the case of an original independent agreement; (f) or, (\*it is conceived) unless the defendant by his answer admit the variation and do not insist on the Statute.[1]

(8.) *As to grounds of defence negating plaintiff's right to specific performance except with a variation of the original written agreement; viz., fraud—mistake—misrepresentation—unfulfilled promise—parol variation, &c.*

On the other hand, it is quite competent for the defendant to set up a variation from the written contract; and it will depend on the particular circumstances of each case whether that is to defeat the plaintiff's title to have

counsel for the defendant, in *Woollam v. Hearn*, 7 Ves. 215; and the judgment in *Attorney General v. Sitwell*, 1 You. & C. Exch. 583; as to admitting evidence in explanation of particular expressions, *vide supra*, p. 451, *et seq.*

(e) *Robson v. Collins*, 7 Ves. 130, 133.

(f) See *Van v. Corpe*, 3 Myl. & K. 269, 277; and Sug. 170.

[1] The rectifying and reforming, solemn written contracts, is a power which, by general chancery jurisdiction, is exercised very sparingly, and only upon the clearest and most satisfactory proof of the intention of the parties. *United States v. Munroe*, 5 Mason 477; 1 Pet. 13; 22 Pick. 69; *Lyman v. United Ins. Co.*, 2 John. Ch. Rep. 630. On bills for a specific performance of an agreement in writing, the defendant has sometimes been admitted to show, by parol proofs a mistake in such agreement, and by that means, to destroy the equity of the bill. The relief on such bills is said to rest in discretion, and if the defendant can show surprise or mistake it makes the special performance of such an agreement unjust. There are cases also, in which the object of the parol proof, is to correct mistakes in bonds, deeds of settlement, mortgages, and generally, in all contracts and agreements, and where the proof is introduced, to aid the plaintiff in his bill, as well as to aid the defendant in his defence. Whether such proof be admissible on the part of a plaintiff who seeks specific performance of an agreement in writing, and at the same time seeks to vary it by parol proof, has been questioned. See *Boyd v. M'Lean*, 1 John. Ch. Rep. 582; *Marks v. Pell*, 1 *ib.* 598, 599; *Washburne v. Merrills*, 1 Day's Cas. in Error, 139; *Comstock v. Hadlyme*, 8 Conn. 854; *Nelson v. Oldfield*, 2 Vern. 76; *Jackson v. Kniffen*, 2 Johns. Rep. 31; *Stevens v. Vancleve*, 4 Wash. C. C. Rep. 265; *Chappel v. Avery*, 6 Conn. Rep. 34; *Farrer v. Ayers*, 5 Pick. 407; *Richards v. Dutch*, 8 Mass. 506, 515; *Reading v. Weston*, 8 Conn. 117; *Flint v. Sheldon*, 13 Mass. Rep. 443.



a specific performance, or whether the court will perform the contract, taking care that the subject matter of this parol agreement or understanding is also carried into effect; so that all parties may have the benefit of what they contracted for.(g)

The admissibility of parol evidence by way of defence to a bill for specific performance of a written agreement, in its literal unvaried terms, may be conveniently considered with reference to four classes of cases; viz.

As to defences which negative plaintiff's right to specific performance except with a variation.

1st. Cases where the defence is, that by fraud, or mistake, the written agreement is, *in terms*, different from that which the defendant supposed it to be, when he executed it; this, if proved, will negative the plaintiff's right to specific performance except with the variation.(h)[1]

1st.—Fraud or mistake affecting the terms of the agreement.

2nd. Cases where the defence is, that by fraud, mistake, or surprise, the defendant executed the written agreement \*under a reasonable misapprehension as to its effect as between himself and the plaintiff;(i)[2] here, also, the

2ndly.—Fraud, mistake or surprise inducing the defendant to enter into agree-  
[\*485]

(g) *Per* Lord Cottenham, Cr. & Ph. 62.

(h) See *Joynes v. Statham*, 3 Atk. 388; *Woollam v. Hearn*, 7 Ves. 211; Sug. 157; *Marquis of Townshend v. Stangroom*, 6 Ves. 328; *Ramsbottom v. Gosden*, 1 Ves. & B. 165; *Garrard v. Grinling*, 2 Sw. 244; *Clinan v. Cooke*, 1 Sch. & L. 38, 39; *Humphries v. Horne*, 3 Ha. 277; but mistake, if relied on, must be clearly proved; *Clay v. Rufford*, 14 Jur. 803, V. C. W.; and see *Alvanley v. Kinmaird*, 2 Mac. & G. 1.

(i) But his mistake as to the use which he might make of it, is unimportant, see *Mildmay v. Hungerford*, 2 Vern. 243.

[1] Parol evidence is admissible to prove that through the mistake of the scrivener, a clause intended by the parties to be in an agreement for the sale of land, was omitted. *Goner v. Sterner*, 2 Wheat. Rep. 75. It may be laid down as settled law, that parol evidence is admissible in cases of fraud, and of plain mistake in drawing a writing. *Christ v. Deffebach*, 1 Serg. & Rawle, Rep. 465. *Per* Tilghman, Ch. J. In South Carolina, it has been decided that the scrivener who drew articles of a marriage settlement, could not be allowed to testify that the object or intention of the deed was different from that which appeared on its face. *Dupres v. McDonald*, 4 Des. 209. See *Gillespie v. Moon*, 2 John. Ch. Rep. 585; *Chapman v. Allan*, Kirby Rep. 399; *Elmore v. Austin*, 2 Root, 415; *Washburn v. Merrill*, 1 Day, 139; *Watson v. Packhurst*, 1 Root, 404; *Cook v. Paston*, 2 Root, 78.

[2] It is no bar to a specific performance, that the conveyance will not have the operation which the vendor thought it would. Hence where, in the case cited in the text, a tenant for life, purchased the reversion, in the

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ment misapprehending its effect;

but not mere suspicion of fraud.

3rdly.—Misrepresentation, or unfulfilled promise, inducing defendant to enter into agreement know-  
[\*486]

court will refuse to make a decree according to the literal terms or strict construction of the agreement. Thus, where the terms of the agreement have been ambiguous, so that, adopting one construction, they may reasonably be supposed to have an effect which the defendant did not contemplate, the court has, upon that ground only, refused to enforce it; (*k*) and this, even where the defendant himself was the author of the ambiguity, and the plaintiff certainly supposed himself to be buying all he claimed; (*l*) the principle is, that it is against conscience for a man to take advantage of the plain mistake of another; or, at least, that a Court of Equity will not assist him in doing so: but the mere existence of circumstances at the date of the contract which might easily have led to fraud, and the want of any professional adviser on the part of the defendant, have been held insufficient to negative the right to specific performance,—no fraud being shown. (*m*)

3rd. Cases where the defendant has obtained the like protection, when he has executed the agreement, knowing its terms and understanding its effect, but relying upon some misrepresentation (*n*) by the plaintiff, or upon some stipulation upon his part, which goes to vary the written

(*k*) *Calverley v. Williams*, 1 Ves. jun. 210; *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & B. 524; V. C. Wigram's judgment in *Manser v. Back*, 6 Ha. 447; and see *Alvanley v. Kinnaird*, 2 Mac. & G. 8. In *Jenkinson v. Pepys*, cited 6 Ves. 330, the evidence appears, in fact, to have been offered on behalf of the plaintiff instead of the defendant: see 6 Ha. 447.

(*l*) *Neap v. Abbott*, 1 C. P. Coop. 333; *Manser v. Back*, *ubi supra*. As to alteration of an agreement, *vide supra*, p. 108, and cases cited: see, also, a case of *Twentymen v. Barnes*, 12 Jur. 743, V. C. K. B., where a plaintiff alleged that the agreement had been altered by chemical agency, and moved that the paper might be subjected to chemical tests; but the court refused the application.

(*m*) *Lightfoot v. Heron*, 3 Y. & C. 586.

(*n*) See *Buxton v. Lister*, 3 Atk. 386; 7 Ves. 219; *supra*, Ch. III. p. 39, *et seq.*, and 62 *et seq.*

hope of extinguishing contingent remainders and afterwards finding that the conveyance would not affect the remainders, brought a bill to be relieved against the security, which he had given for the purchase-money; the court gave him his option, either to pay the principal, interest, and costs, or to have his bill dismissed with costs.

agreement, but which he refuses to fulfil: *e. g.*, a parol promise to vary the terms of the written agreement has been admitted as a defence to a bill seeking its specific performance ;(o) and the same decision has been come to in the case of a parol promise by the auctioneer, on behalf of the vendor, to allow compensation for a deficiency in quantity ; the right to which was in effect negatived by the particulars.(p)[1]

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ing its terms  
and effect.

(o) *Clarke v. Grant*, 14 Ves. 519; *Micklethwait v. Nightingale*, 12 Jur. 638, R.

(p) *Winch v. Winchester*, 1 Ves. & B. 375, 378; and see Sir E. Sugden's remarks, p. 160, upon Sir Thomas Plumer's remarks in *Clowes v. Higginson*, 1 Ves. & B. 526.

[1] In the case of *Clowes v. Higginson*, which is here referred to, an estate was sold in lots, and at the end of some of the lots only, it was stated that the timber was to be taken at a valuation, but there was a general condition that the timber should be paid for; the seller's bill for a specific performance requiring the purchaser of several lots to pay for all the timber, was dismissed, and parol evidence of the declaration of the auctioneer that the timber on all the lots was to be paid for, was of course rejected. But the Master of the Rolls said he desired not to be understood as delivering any opinion whether, supposing these plaintiffs had been defendants, the evidence would, or would not, be admissible, but his opinion was, that clearly, upon the part of a plaintiff seeking performance, it could not be received. The purchaser then filed a bill against the seller, for a specific performance, according to his construction that he was to pay for the timber on the lots only to which a stipulation to that effect was added. The seller, as defendant, offered parol evidence of the declaration by the auctioneer. The vice chancellor agreed that fraud would let in the evidence as a defence. He added, that upon clear evidence of mistake or surprise, that the parties did not understand each other, it is introduced, not to explain or alter the agreement, but, consistently with its terms, to show circumstances of mistake or surprise, making a specific performance, as in the case of fraud, unjust, and therefore not conformable to the principles upon which a court of equity exercises this jurisdiction. There was however, considerable difficulty in the application of evidence under this head, calling for great caution, particularly upon sales by auction, lest, under this idea of introducing evidence of mistake, the rule should be relaxed, by letting it in to explain, alter, contradict, and in effect, get rid of a written agreement. In sales by auction, the real object, he said, of introducing declarations by auctioneers, or other persons, is to explain, alter, or contradict the written agreement; in effect, to substitute another contract; and, independent of authority, he should be much disposed to reject such declarations, as open to all the mischief against which the statute was directed, and also violating the rule of law which prevailed previously, whether offered by a plaintiff seek-

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*Croome v.  
Lediard.*

However, where A. agreed to purchase Black Acre of B., and B. by the same instrument agreed to purchase

*ing a performance or by a defendant to get rid of the contract*—a distinction which it was difficult to adopt, where the evidence is introduced to show that the writing purporting to be a contract, is not the contract; that there is no contract between them, if that which was proved by parol, did not make a part of it. That does not depend upon the principle on which a defendant is permitted to show fraud, mistake, or surprise, collateral to, and independent of the written contract, the object in the other case being to get rid of the contract, by explaining it away. He did not recollect any instance, that evidence offered in that view had been received, but there were cases, in which it had been rejected. But no authority having decided that evidence could be received except upon one of the grounds of fraud, mistake, or surprise, and the declarations in this case, being offered where the parties had contracted in writing, upon a subject distinctly adverted to, in their written contract, which made a provision for it, the evidence of these declarations, he said, must be rejected, because there was no fraud, mistake, or surprise, and the evidence was offered to contradict, explain, or vary, the written contract. "This judgment," says Sugden (1 Sug. on Vend. p. 164, 165) "does not seem to be warranted by the principles of the court. It is manifest that the learned judge was disposed to overrule the settled distinction. It is not necessary, in order to render the evidence admissible, that its object should be to show fraud, mistake, or surprise, collateral to, or independent of the written contract, although that usually, is its tendency; but the evidence is admissible where, by way of defence, the object is to get rid of the contract, by showing that it is not the contract really entered into by the parties, although where, even as a defence, the evidence is used to show that the terms of the contract are not the real ones, the evidence, when admitted, must be very powerful to induce the court to believe that the terms expressed are not the real ones."

In the case of *Winch v. Winchester* cited in the text, lands, which upon admeasurement did not contain thirty-six acres, were described in a particular, to contain forty-one acres, by estimation, were the same, more or less, and the purchaser in answer to a bill for a specific performance, set up parol declarations of the auctioneer that he sold it for forty-one acres, and if it was less, an abatement should be made, the Master of the Rolls admitted the evidence, and dismissed the bill, because, after such a declaration made by the auctioneer, it was fraudulent and unfair in the seller, to insist upon the execution of the contract, not giving the defendant the benefit of that declaration. And yet the subject was distinctly adverted to in the written contract, and indeed the provision was free from ambiguity, and the parol evidence contradicted it; whereas, in *Clowes v. Higginson* there was an ambiguity—two statements which might be considered at variance with each other—which the parol evidence would have explained. The evidence, it is submitted, in the latter case, was admissible in equity as a defence, simply on the ground that the plaintiff who ought to come into equity with clean hands, sought to commit a fraud in evading to pay for the timber, although the auctioneer declared that it was to be paid for.

White Acre of A., and no title could be shown to Black Ch. XVIII.  
 Acre, it was held that, in a suit by A. for specific performance of the agreement for the sale of White Acre, B. could not, as a defence, show that the performance of one agreement was intended to be conditional on the performance of the other; that the intention was to effect an exchange and not independent sales: Lord *Brougham*, C., in affirming the judgment of Sir *J. Leach*, observed, that "parol evidence of matter collateral to the agreement might be received, but no evidence of matter *dehors* was admissible to alter the terms and substance of the contract:"(q) upon which Sir *E. Sugden* observes, that the evidence was inadmissible, "not because it was not to enforce a collateral stipulation, but because it did not prove that by fraud, mistake, or surprise, the agreement did not state the alleged real contract, viz., for an exchange between the parties."(r)[2]

The meaning of the above extract from the judgment of \*the late Chancellor, is, perhaps, not very obvious; if meant to intimate that the non-fulfilment of a stipulation upon a point collateral to the written agreement, and not inconsistent with such agreement, nor shown to have formed any special inducement to its execution, is a good

[\*487]

(q) *Croome v. Lediard*, 2 Myl. & K. 251, see 260; and see *Lloyd v. Lloyd*, 2 Myl. & Cr. 192.

(r) Sug. 161.

[2] Sugden remarks, "The decision in this case was probably well founded, although it is not perhaps altogether placed upon true grounds. The evidence, it is submitted, was inadmissible, not because it was not to enforce a collateral stipulation, but because it did not prove that by fraud, mistake, or surprise, the agreement did not state the alleged real contract, viz., for an exchange between the parties. The defendant was an attorney, and fraud was not alleged, nor indeed, was mistake or surprise, for he had himself prepared the agreement, and he preferred making it a mutual contract for sale and purchase, instead of an exchange, and of course, he could not be permitted to alter its character by parol evidence of the mode in which the negotiation was conducted, and of the views of the parties, in order to avoid the consequences which attached to the nature of the contract which the parties, with their eyes open, having regard to other objects, had thought it proper to adopt. It seems important to refer this case to the true grounds upon which it is to be supported, in order to prevent the rule from being misunderstood."

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Parol addition to written agreement, when inadmissible as a defence.

Remarks upon the cases.

defence in equity, the *dictum* seems of questionable authority; it having been held that the defendant cannot set up an additional parol stipulation, (*e. g.*, as to the time for delivery of possession,) which was agreed upon by the parties at the time of their signing the written contract. (s)[1]

The distinction in principle between such cases would seem to be this; in the one case, the object of the defence is, not to invalidate or vary the written agreement, except so far as such effect may be incidentally produced by proving a parol agreement relating to the same subject-matter; and this is contrary to the statute: in the other case, the object of the defence is, to directly attack the written agreement itself, by showing that it was executed under mistake, or on the faith of a misrepresentation by

(s) *Omerod v. Hardman*, 5 Ves. 722, 730; and see Sug. 163, *et seq.*, and 187.

[1] In this case the vendor filed a bill for a specific performance. It was not mentioned in the written agreement, at what time the purchaser was to take possession of the estate; but the purchaser, the defendant, offered parol evidence to show that it was, at the same time, agreed, though not made part of the written agreement, that he should be let into possession, at a stated time; and he resisted a performance of the agreement, on the ground of possession not having been delivered to him according to the parol agreement. Mr. Justice Chambre objected to the evidence being read. He said that it was urged for the defendant, that evidence may be read where the parol agreement is not inconsistent with the written agreement. This, (that is, the parol agreement, in the case before him) he added, was to further the written agreement, and to secure what was, through carelessness omitted to be provided for in the written agreement, viz., delivery of possession, according to the custom of the country. Mr. Baron Graham said, that the parol agreement could only be admitted where the written agreement was not drawn according to the intention of the parties at the time. You cannot, by parol, add anything to what was the real agreement at the time, after that has been correctly reduced into writing. And he entirely agreed with Mr. Justice Chambre, that the parol, could not be made to form part of the written agreement.

See *Jackson v. Sill*, 11 Johns. Rep. 201; *Sessions v. Barfield*, 2 Bay, 94; *Dickerson v. Dickerson*, 1 Car. Law Rep. 262; *Smith v. Williams*, 1 Murphy, 426; *S. C.*, 1 Car. Law Rep. 263; *Streator v. Jones*, 1 Murphy, 449; *Snyder v. Snyder*, 6 Binn. 483; *Stevens v. Cooper*, 1 Johns. Ch. Rep. 425; *Movau v. Hays*, 1 Johns. Ch. Rep. 339; *Slockpole v. Arnold*, 11 Mass. Rep. 27; *Fitzhugh v. Runyon*, 8 Johns. Rep. 292; *Thompson v. Ketcham*, 8 Johns. Rep. 146.

the other party, or of a promise made by him, and which, from his refusal to fulfil it, must be taken to have been originally fraudulent: and where the collateral parol agreement is inconsistent with the written contract, the conclusion would seem to be almost inevitable, that the latter was executed by the party favored by the parol agreement, either under a mistake as to the contents of the written contract, or under a reliance on the good faith of the other party in performing the parol variation: and the fact of the point being provided for by the written contract, would seem to show, that the parties deemed it important; whereas the contract may be reasonably presumed of a parol stipulation upon a point which is in no way provided for by the written contract.

\*But where a stipulation is omitted from the written agreement, upon the supposition that it is illegal, the parties are bound by such omission.(t)

[\*488]  
Stipulation  
omitted by  
consent, no  
defence.  
4th.—Subse-  
quent parol  
variation,  
part per-  
formed.

4th. Cases where the written agreement is varied by parol subsequently to its execution: in which cases the variation, to be available as a defence, must be accompanied by such a part performance as would enable the Court to enforce it if it were an original independent agreement: (u) subject nevertheless to the doctrine of equity which allows parties, by their acts, to vary the original agreement in respect of matters relating to title and the time for completion.(w)[1]

(t) *Lord Irnham v. Child*, 1 Bro. C. C. 92; see 6 Ves. 332; Sug. 186.

(u) See Sug. 170; *Legal v. Miller*, 2 Ves. 299; *Price v. Dyer*, 17 Ves. 356.

(w) Sug. 170.

[1] The result of the authorities as to a parol variation seems to be:—1st. That evidence of it, is inadmissible at law; 2d. That in equity, the most unequivocal proof of it, will be expected; 3dly. That, if it be proved to the satisfaction of the court, yet it cannot be used as a defence to a bill demanding a specific performance of the original contract, with the variation introduced by parol, unless there has been such a part performance of the new parol agreement, as would enable the court to grant its aid in the case of an original independent agreement, and then, in the view of equity, it is tantamount to a written agreement, and effect will be given to it, either in favor of a plaintiff or a defendant. But some variations, not admitted at law, for example, the title and time, equity has always, ex-

(9.) *As to grounds of defence negating in toto plaintiff's right to specific performance ; viz., personal incapacity—nature of contract, or fraud, &c. &c. attending its execution ;—matters relating to the estate,—title—or consideration—plaintiff's conduct, &c., after contract ;—election of other remedy.*

As to defences which negative in toto plaintiff's right to specific performance.

We may next consider those grounds of defence which, assuming the existence of a *prima facie* valid agreement, go to negative *in toto* the right to specific performance ; and these may, perhaps, be conveniently considered under the several heads of, 1st, matters relating to the personal capacity of the parties to contract ; 2nd, matters relating to the nature of the agreement, or the circumstances under which it was entered into ; 3rd, matters relating to the estate contracted for ; 4th, matters relating to the title thereto ; 5th, matters relating to the consideration ; and 6th, matters relating to the conduct of the plaintiff subsequently to the date of the agreement.

[\*489]

1st.—Personal incapacity to contract on part of defendant.

Intoxication.

\*As to the 1st of the above heads.—Personal incapacity on the part of the defendant to enter into the contract(x) is, of course, a sufficient defence to a suit for specific performance ; unless, having recovered his contracting capacity, he has confirmed or adopted the agreement. We may here remark, that although intoxication, if excessive, amounts to a temporary deprivation of reason,(y) and is a good defence, although the party may not have been drawn into drink by the plaintiff,(z) yet it has been held that the mere fact of the defendant having partaken freely

(x) As to which, *vide supra*, Ch. I.

(y) See *Cooke v. Clayworth*, 18 Ves. 12, 16 ; *Cragg v. Holme*, *ib.* 14, n. ; *Nagle v. Baylor*, 3 Dru. & War. 60.

(z) *Malins v. Freeman*, 2 Keen, see p. 34.

exercising its peculiar jurisdiction, deemed to be subjects which the parties might waive by their acts. And even where part of the subject matter of the agreement might have been valid by sale and delivery, and an agreement in writing was not requisite, yet if the agreement be entire, it must so continue, and it cannot be separated or altered otherwise than by writing.



of liquor at the time of entering into the contract, is not, Ch. XVII.  
 in the absence of fraud, or of evidence that he was with-  
 out the full understanding and knowledge of what he was  
 doing, a reason for refusing specific performance.(a)[1]

(a) *Lightfoot v. Heron*, 3 You. & C. 586.

[1] "In respect to drunkards," says Story, (1 Story's Eq. Juris., s. 230 *et seq.*) "although it is regularly true that drunkenness does not extenuate any act or offence committed by any person against the laws, but rather aggravates it; and although, in strictness of law, the drunkard has less ground to avoid his own acts and contracts than any other *non compos mentis*, yet courts of equity will relieve against acts done, and contracts made by him while under this temporary insanity, where they are procured by the fraud or imposition of the other party. For, whatever may be the demerit of the drunkard himself, the other party has not the slightest ground to claim the protection of courts of equity against his own grossly immoral and fraudulent conduct. But to set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case, there can, in no just sense be said to be a serious and deliberate consent on his part; and without this no contract, or other act, can, or ought to be binding by the law of nature. If there be not that degree of excessive drunkenness, then courts of equity will not interfere at all, unless there has been some contrivance or management to draw the party into drink, or some unfair advantage taken of his intoxication to obtain an unreasonable bargain or benefit from him. For, in general, courts of equity, as a matter of public policy, do not decline, on the one hand, to lend their assistance to a person who has obtained an agreement, or deed from another, in a state of intoxication; and, on the other hand, they are equally unwilling to assist the intoxicated party to get rid of his agreement or deed, merely on the ground of his intoxication at the time. They will leave the parties to their ordinary remedies at law, unless there is some fraudulent contrivance, or some imposition practiced. It is upon this special ground that courts of equity have acted in cases where a broader principle has sometimes been supposed to have been upheld. They have, indeed, indirectly, by refusing relief, sustained agreements which have been fairly entered into, although the party was intoxicated at the time. And especially they have refused relief where the agreement was to settle a family dispute, and was, in itself, reasonable. But they have not gone the length of giving a positive sanction to such agreements, so entered into, by enforcing them against the party, or in any other manner than by refusing to interfere in his favor against them. In regard to drunkenness, the writers upon natural and public law adopt it, as a general principle, that contracts made by persons in liquor, even though their drunkenness be voluntary, are utterly void, because they are incapable of any deliberate consent, in like manner as persons who are insane, or *non compos mentis*.

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Personal incapacity on part of plaintiff, how far a defence.

Personal incapacity on the part of the plaintiff at the time of the contract, cannot, it is conceived, be set up as a defence to a suit for specific performance, if the plaintiff has recovered his capacity at the time of filing the bill or claim ;(b) but the existence of incapacity at the time of the bill or claim being filed, would appear to be a good defence :(c) and, at any time during its existence, the contract, it is conceived, may be put an end to by due notice from the party bound ;(d) except where the incapacity consists in infancy, in which case the other party appears to have no power to rescind the contract ;(e) but the infant cannot, while an infant, enforce the contract :(f)[2] a contract by husband and wife for the sale of the wife's estate, [\*490] \*may also, perhaps, be considered an exceptional case ; that is, if the purchaser, at the date of the contract, be aware that the property belongs to the wife.(g)

2d.—Matters relating to the contract,

As to the 2nd of the above heads.—Where the contract has been entered into for an illegal purpose, whether the

(b) *Clayton v. Ashdown*, 9 Vin. Abr. 393, 394 ; and see cases cited, *infra*, as to mutuality.

(c) *Flight v. Bolland*, 4 Russ. 298.

(d) See, and consider, *Martin v. Mitchell*, 2 Jac. & W. 428.

(e) See Chambers on Infancy, 442 ; *Shannon v. Bradstreet*, 1 Sch. & Lef. 58 ; *Smith v. Bowin*, 1 Mod. 25.

(f) *Flight v. Bolland*, 4 Russ. 298.

(g) See 2 Y. & C. C. 62.

*tis.* The rule is so laid down by Heineccius and Puffendorf. It is adopted by Pothier, one of the purest of jurists, as an axiom which requires no illustration. Heineccius, in discussing the subject, has made some sensible observations. "Either," says he, "the drunkenness of the party entering into a contract, is excessive, or moderate. If moderate, and it did not quite so much obscure his understanding as that he was ignorant with whom, or for what he had contracted, the contract ought to bind him. But if his drunkenness was excessive, that could not fail to be perceived ; and, therefore, the party dealing with him must have been engaged in a manifest fraud ; or, at least he ought to impute it to his own fault that he had dealt with a person in such a situation. The Scottish law seems to have adopted this distinction ; for, by that law, persons in a state of absolute drunkenness, and consequently deprived of reason, cannot bind themselves by any contracts. But a lesser degree of drunkenness, which only darkens reason, has not the effect of annulling contracts."

[2] The reason for this is, that there is no mutuality.

same be expressly prohibited or be merely the subject of a statutory penalty, equity will refuse to enforce it.<sup>(h)</sup>[1] although it appears that if a legal agreement be intended in all events to be executed according to its terms, it will not necessarily be avoided by a collateral parol stipulation for something not *malum in se* but merely prohibited:<sup>(i)</sup> so, also, if the contract be in contravention of the rights of a third party,<sup>(k)</sup> equity will refuse to interfere; as where it derogates from a previous voluntary settlement by the plaintiff vendor:<sup>(l)</sup> so, also, if the enforcement of the contract would be against public policy, as where it originated in the improper disclosure of evidence taken in a chancery suit:<sup>(m)</sup> so, also, if the completion of the contract would amount to a breach of trust;<sup>(n)</sup> even by reason of any \*stipulation collateral to the mere agreement for sale; as where it was agreed that the purchaser

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&c. :—illegality.

Impolicy.

Breach of trust.

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(A) See *Thomson v. Thomson*, 7 Ves. 470; *Knowles v. Haughton*, 11 Ves. 168; *De Begnis v. Armistead*, 10 Bing. 107; *Ewing v. Osbaldiston*, 2 Myl. & Cr. 53, 85; *Gas Light Company v. Turner*, 8 Sco. 609; and see *Tomlinson v. Manchester and Birmingham Railway Company*, 2 Rail. Ca. 104; *Ritchie v. Smith*, 6 C. B. 462; see, as to the difference between enforcing an illegal contract and asserting title to money which has arisen from it, *Sharp v. Taylor*, 2 Phill. 801. As to champerty, *vide supra*, p. 111, *et seq.*; and see *Cook v. Field*, 14 Jur. 951.

(i) See *Carolan v. Brabazon*, 3 J. & L. 200.

(k) See *Harnett v. Yeilding*, 2 Sch. & Lef. 549, 554; and see, and consider *Peacock v. Penson*, 11 Beav. 355.

(l) *Smith v. Garland*, 2 Mer. 123; *Johnson v. Legard*, Turn. & Russ. 281.

(m) *Cooth v. Jackson*, 6 Ves. 12, 30.

(n) *Mortlock v. Buller*, 10 Ves. 292; *Ord v. Noel*, 5 Mad. 438; and see other-cases cited, Sug. 240; also *Baylies v. Baylies*, 1 Coll. 546; *Bellringer v. Blagrove*, 1 De G. & S. 66; *White v. Cuddon*, 8 Cl. & F. 766: we have seen that an agreement giving A. a right of pre-emption over B.'s estate, in consideration of A. not opposing B. on a sale by auction of other property, is not illegal; *Gallon v. Emuss*, 1 Coll. 243.

[3] See *Hannay v. Eve*, 3 Cranch, 242; *McDermid v. McCarlland*, Hardin Rep. 18; *Hepburn v. Dunlop*, 1 Wheat. Rep. 179; 1 Edw. Ch. Rep. 512; *Dedham Bank v. Chickering*, 4 Pick. 314; *Armstrong v. Toler*, 11 Wheat. 258; *Barile v. Nutt*, 4 Peters Rep. 184; *Perkins v. Savage*, 15 Wend. 419; *Bolt v. Rogers*, 3 Wend. 157; *St. John v. Benedict*, 6 Johns. Ch. Rep. 111; *Herrick v. Grow*, 5 Wend. 579; *Bridgewater v. Brookfield*, 3 Cowen 299; *Myers v. Hodges*, 2 Watts, 381; *Nellis v. Clark*, 20 Wend. 24.

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Improvident  
contract by  
agent.

should, out of the purchase-money, retain a debt due to him from the selling trustee;(o) so, if an agreement be entered into by an agent, the omission of all usual and proper stipulations in favor of his principal,(p) may be a reason for refusing specific performance.

## Hardship.

So, equity has refused to enforce contracts on the mere ground of their hardship as against the defendants: as where one-half the purchase-money would, under a clause of forfeiture contained in the will of a prior owner, have gone to a third party;(q)[1] or, as where the contract provided that a road should be made by the vendor over property retained by him, and it appeared the making of the road would risk the forfeiture of the lease of part of the estate:(r) so, it has been held, that a mortgagor, contracting to grant a lease, should not be compelled to pay off the mortgage in order to enable him to complete the contract:(s) so, where a tenant for life who, upon the settlement by him of lands of equal value, would have been absolutely entitled to the settled estates, contracted to sell them, the court would not order him to procure and settle other lands, and so acquire a title:(t) so, where the trustees of an estate, joined, expressly in that capacity, with the beneficial owners, in a contract for sale, and all agreed to exonerate the estate from any incumbrances which might affect it, the court refused to enforce this agreement

(o) *Thompson v. Blackstone*, 6 Beav. 470.

(p) *Helsham v. Langley*, 1 Y. & C. C. C. 175.

(q) *Faine v. Brown*, cited 2 Ves. 307.

(r) *Peacock v. Penson*, 11 Beav. 355.

(s) *Costigan v. Hastler*, 2 Sch. & Lef. 160.

(t) *Howel v. George*, 1 Madd. 1; and see *Southwell v. Nicholas*, cited page 9, n.

[1] Where a man was entitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase-money should go to his brother; he agreed, in writing, to sell it, and afterwards refused to carry the sale into execution, pretending to have been intoxicated at the time. A bill was brought against him to compel a specific performance; and Lord Hardwicke held that, without the other circumstance, the hardship alone of losing half the purchase-money, if carried into execution, was sufficient to determine the discretion of the court not to interfere, but leave them to law.

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against the trustees, when it seemed probable that the incumbrances might, and perhaps materially, \*exceed the amount of purchase-money: (u) so, where the contract was intended by both parties to be the means of forwarding a common object which had utterly failed before the bill was filed, the court refused to interfere. (w)

So, equity will refuse to enforce a contract which was procured by fraud, or duress, (x) or was entered into under a common mistake, (y) or, in many cases, a mistake only by the defendant; (z) or under the influence of surprise; (a) or was founded on a fraudulent or material misrepresentation or concealment of facts by the plaintiff. (b)

Fraud, mistake, surprise, misrepresentation, or concealment.

The following remarks were, in a recent case, made by Lord Langdale, M. R., as to the effect, in equity, of misrepresentation on the part of the plaintiff: (c)—“Cases have frequently occurred, in which, upon entering into contracts, misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied upon the result of his own investigation and inquiry, and not upon \*the representations made to him by the other party: or, if the means of investigation and verification be at hand, and

Lord Langdale's remarks on misrepresentation.

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(u) *Wedgwood v. Adams*, 6 Beav. 600; and see, as to hardship, *Talbot v. Ford*, 13 Sim. 173; *Hemingway v. Fernandes*, *ib.* 243; *Kimberley v. Jennings*, 6 Sim. 340.

(w) *Padwick v. Hanslip*, 14 L. T. 543.

(x) But the mere fact of a person being in prison at the time of signing the contract is no defence; *Brinkley v. Hann*, 1 Dru. 175.

(y) *Slapillon v. Scott*, 13 Ves. 425, 427; *Lord Gordon v. Lord Hertford*, 2 Madd. 106; *Colyer v. Clay*, 7 Beav. 188.

(z) See *Malins v. Freeman*, 2 Keen, 25; *Harnett v. Yielding*, 2 Sch. & Lef. 549, 554; *Howell v. George*, 1 Madd. 1, 11; but not where the mistake is as to the legal consequences of an act; *Great Western Railway Company v. Cripps*, 5 Ha. 91.

(a) See *Evans v. Llewellyn*, 2 Bro. C. C. 150; *Twining v. Morrice*, *ib.* 326; *Lord Townshend v. Stangroom*, 6 Ves. 328, 338; *Willan v. Willan*, 16 Ves. 72; and see Story's Eq. Jur. note to sect. 120.

(b) See Sug. 238, and cases cited *supra*, Ch. III. and Ch. IV. 63, *et seq.*: and *Oermont v. Tasburgh*, 1 Jac. & W. 112; *Cadman v. Horner*, 18 Ves. 10; see *Barker v. Harrison*, 2 Coll. 546.

(c) *Clapham v. Shillito*, 7 Beav. *see* p. 149.

Ch. XVIII. the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such, as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained; and thus the notion of reliance on the representations made to him may be excluded.

"Again, when we are endeavoring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter, and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be, possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into, after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made by him who was supposed to be better informed: but if the subject is, in its nature, uncertain,—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill,—it is not easy to presume that representations made by one would have such an influence upon the other."<sup>[1]</sup>

Agreement  
fair, as be-  
tween par-  
ties, is not

And an agreement, fair as between the parties, is not invalid merely because it may have been concocted and

[1] Misrepresentations, to be relieved against, must, in the first place, be of something material, constituting an inducement or motive to the act or omission of the party, and by which he is actually misled to his injury. In the next place, the misrepresentation must not only be in something material; but it must be in something in regard to which the one party places a known trust and confidence in the other. It is not every wilful misrepresentation, even of a fact, which will avoid a contract on the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it, and it was his own folly to give credence to it; for, courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort.

brought about by a third person, with a fraudulent intention of benefitting himself.(d)

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avoided by fraud of third person.

Want of mutuality of remedy—whether a defence

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Want of mutuality of remedy is a ground of defence not unfrequently relied on; and respecting which the rules \*of the court seem somewhat undefined. The principle would seem to be one of clear equity; viz., that a defendant ought not to be harassed with litigation founded on an agreement which he himself could not enforce if the plaintiff were to think fit to stop proceedings: for this reason, it was once doubted whether a plaintiff could enforce a written agreement which he himself had not signed: but it was ultimately decided(e) that he could, inasmuch as filing the bill binds him to the contract, and from that time there is mutuality:(f) so, as we have seen, the personal incapacity of the plaintiff to enter into the contract is, generally, if subsisting at the time of the bill being filed, a good defence.(g)

The non-mutuality-defence has generally been grounded upon the alleged entire, or partial want of title in a plaintiff vendor: such want of title, it must be remembered, being urged as an objection to the existence or validity of the contract, and not by way of denial of his present ability to give to, or procure for, the defendant his rights under the same. Thus, it has been held that A. cannot enforce, against C., an agreement for the sale to him of B.'s estate; even although B. be willing to confirm the contract:(h) and Sir E. Sugden considers it doubtful(i) "whether there is *any* case in which a man, knowing himself not to have any title, has been allowed to enforce the contract by procuring a title before the re-

when founded on alleged want of title in plaintiff vendor.

(d) *Bellamy v. Sabine*, 2 Ph. 425.

(e) See 2 Coll. 161.

(f) *Martin v. Mitchell*, 2 Jac. & W. see p. 427; *Coleman v. Upcot*, 5 Vin. Abr. 528; *Dowell v. Dew*, 1 Y. & C. C. C. 345; *Buller v. Powis*, 2 Coll. 161; see *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 57; but see also *Gaskarth v. Lord Louthier*, 12 Ves. 107.

(g) *Vide supra*, p. 489.

(h) *Moel v. Hoy*, cited Sug. 241; and see *Tendring v. London*, 2 Eq. Ca. Ab. 680; *Armiger v. Clarke*, Bunb. 111.

(i) Sug. 241, n. (p)

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port.(k)[1] But, as a general \*rule, where no legal invalidity affects the contract, the enforcement of it in equity is a matter of judicial discretion;(l) and, in several cases, specific performance has been decreed at the suit of vendors who, contracting under the *bona fide* belief that they could make a good title, afterwards, on discovering that they had no title, either legal or equitable, procured the concurrence of the necessary parties:(m)[2] as, also, at the suit of vendors who had contracted to sell the fee simple, knowing that they had only a life estate or other lim-

(k) See, on this point, *Bryan v. Lewis*, Ry. & Moo. 386, (a case at law on a sale of goods;) *Leckmere v. Brasier*, 2 Jac. & W. 289; *Dalby v. Pullen*, 3 Sim. 29; 1 Russ. & Myl. 296; and the cases cited *infra*, n. (o)

(l) 2 Y. & C. C. C. 64.

(m) See *Hoggart v. Scott*, 1 Russ. & Myl. 293, a case of mistake as to the proper parties to exercise a power of sale under a will; *Chamberlain v. Lee*, 10 Sim. 444, where the frontage of the estate was found to belong to a third person; *Eyston v. Simonds*, 1 Y. & C. C. C. 608, where the estate had escheated to the crown; and see *Williams v. Carter*, cited Sug. 241.

[1] Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power, by the ordinary course of law or equity, to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take it; for, every seller ought to be a *bona fide* contractor; and it would lead to infinite mischief, if one man were permitted to speculate upon the sale of another's estate. Besides, the remedy is not mutual, which perhaps is, of itself, a sufficient objection in a case of this nature. In *Armiger v. Clark*, to which reference is made in the text, a tenant for life contracted to sell the inheritance. After his death, his son, who was entitled to the estate in remainder, and was not bound by his father's covenant, brought a bill for a specific performance against the purchaser, and it was dismissed chiefly upon this principle, that the remedy was not mutual.

[2] In the case of *Hoggart v. Scott*, to which reference is here made, personal representatives of a trustee, supposing, erroneously, that they had power to sell, entered into a contract for sale, and, when the mistake was discovered, the purchaser was apprised that the sellers would take the necessary steps to make a title, which they did; but, before they were completed, the purchaser brought an action for his deposit, which he recovered, and then the sellers filed a bill for a specific performance; it was held that the purchaser, if he had thought fit, might have declined the contract, as soon as he discovered that the plaintiffs had no title, and he was not bound to wait until they had acquired a title; but, he not having taken that course, it was enough that, at the hearing, a good title could be made.



ited interest, and relying on being able to procure the concurrence of the parties entitled in remainder: (n) and it seems by no means clear whether, even in the extreme case of A. contracting to sell the estate of B., A. would not be entitled to specific performance, if, by procuring a conveyance from B., he were able to make a good title at the time fixed for the delivery of the abstract, or even at the time fixed for completion. (o) Perhaps, in all such cases, the material point may be, whether the purchaser, upon discovering that the estate is not bound, has at once repudiated the contract, or has continued to negotiate upon the footing of its being still subsisting. (p) However, in a modern case, where trustees with a power of sale exercisable with the consent of the tenant for life, entered into a contract, and filed a bill for specific performance, but did not procure the \*requisite consent until after the commencement of the suit, V. C. Knight Bruce intimated a doubt whether the bill should not be dismissed, although this had not been contended for by the defendant. (q)

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The fact that the vendor contracted to sell his own estate, in the name of, or as agent for, another; (r) or that the nominal purchaser was in fact the agent for a third person with whom the vendor has quarrelled upon other matters, (s) or to whom he has given a bare refusal (t) to deal for the estate; is not, in general, any defence to a suit for specific performance, unless the case can be brought within the class of cases noticed *supra*, (u) by

Nominal  
contractor.

(n) *Lord Stourton v. Meers*, cited 2 P. Wms. 530: *Wynn v. Morgan*, 7 Ves. 202; *Coffin v. Cooper*, 14 Ves. 205; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 54.

(o) See *Mortlock v. Buller*, 10 Ves. 315; *Boehm v. Wood*, 1 Jac. & W. 421; and see 2 Y. & C. C. C. 64.

(p) See *Eyston v. Simonds*, 1 Y. & C. C. C. 608; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 65.

(q) *Adams v. Broke*, 1 Y. & C. C. C. 627, 630.

(r) *Fellowes v. Lord Gwydyr*, 1 Russ. & M. 83.

(s) *Hall v. Warren*, 9 Ves. 605.

(t) Sug. 242, citing *Lord Irnham v. Child*, 1 Bro. C. C. 92, see p. 95; *sed quære*, whether this doctrine can be extended to cases of refusal grounded on any particular and specified reason; see 1 Coll. 219.

(u) P. 492.

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Insertion of  
penalty, no  
defence.

showing that the misrepresentation was used as the inducement to the defendant to enter into the contract. (w)[1]

The insertion in the contract of a penalty in case of non-performance, is no defence to a suit for specific per-

(w) *Phillips v. Duke of Bucks*, 1 Vern. 227; *Scott v. Langstaffe*, cited Loft, 797; and see *Nelthorpe v. Holgate*, 1 Coll. 203. It appears that specific performance was decreed in *Phillips v. Duke of Bucks*, see 14 Ves. 527, n. Upon which it may be remarked that the Duke's equity seems to have been of (according to modern notions) a very doubtful character: amounting in substance, to this, viz., that he had sold the estates at an undervalue by way of bribe to the chancellor before whom causes, in which the Duke was interested, were depending \* see the account of the transaction from Roger North, cited Sug. 243, n.

[1] If a person apply to purchase an estate and the vendor expressly refuse to treat with him unless the money is paid down, which he is unable to do, but procures some other person to purchase the estate on his account, it seems clear that at least the time appointed for payment of the money will be deemed of the very essence of the contract. So if a person apply to purchase an estate on behalf of A., for whom the vendor has a great value or affection, and the vendor is induced to take less for the estate than he otherwise would have done; or even, perhaps, without this circumstance, the agreement cannot be enforced against the vendor, if it be made on behalf of any other person than A.; but if A. will patronize the sale, execution of the agreement must be compelled, although he may sell the estate the next day, to the fraudulent purchaser. In *Hawkin's Life of Johnson*, the following case is mentioned:—Peele, the bookseller, had a house near Garrick's, at Hampton. Peele had often said that as he knew it would be an accommodation to Garrick, he had given directions that at his decease he should have the refusal of it. On Peele's death, a man in the neighborhood applied to his executors, pretending that he had a commission from a friend or relation of Peele's who lived in the country, to buy the house at any price, and he accordingly obtained a conveyance of it to a person nominated by him under a secret trust for himself. Garrick filed a bill against him, and the purchase was decreed fraudulent, and set aside with costs. But although a seller falsely assume the character of an agent, to another, when he is himself the real seller, and the purchaser be deceived by the representation, yet it has been decided that if the purchaser cannot prove damage, or that the misrepresentation induced him to enter into the contract, a specific performance will not be refused. But where a purchaser had a suspicion of the ownership of the subject offered for sale, and the ownership in his view enhanced the price, and the seller's agent knowing that the purchaser labored under a deception, permitted him to remain in it, although the point was one which he thought material to influence his judgment, the contract was held to be void at law. See 1 Sug. on Vend. p. 252, 253, and cases; *Ten Broeck v. Livingston*, 1 Johns. Ch. Rep. 357, 363; *Boyle v. Rowand*, 3 Des. 555; *King v. Bardeau*, 6 Johns. Ch. Rep. 38.

formance; (x) in a late case, a decree was made upon an agreement which took the shape of a bond. (y) [1] Ch. XVIII.

The circumstance that damages could not be recovered upon the contract at law, is not, universally, a good defence to a suit for specific performance, although, as \*observed by Lord Hardwicke, (z) "There are very few cases in which a court of equity can decree a performance of a covenant or agreement upon which there can be no action at law, according to the words of the articles and the events which have happened;" Sir E. Sugden considers the result of the authorities (which are conflicting) to be, that although "equity cannot contradict or overturn the grounds or principles of law" it will yet decree specific performance of an agreement void at law "if there is a clear ground for the interference of equity according to the general rules of the court." (a) Inability to recover damages at law, how far a defence. [\*497]

As to the 3rd of the above heads.—Upon defects in the estate itself, we may refer to former observations respecting misdescriptions and compensation: (b) we may also remark that, although either the original non-existence of, or the want of a sufficient title to, a material part of the property, or that part of it which may have formed the inducement to the purchaser, is a sufficient defence to a bill for specific performance, yet mere non-existence does not, universally, as a ground of defence, stand so high as want of title; for it may, obviously, be often a very different matter to a purchaser whether he be simply unable to get a particular part of what he contracted for, or whether such part will be liable to be held by another person, and converted into a nuisance. (c) [2] 3rd. Matters relating to the estate:—original defects in, how far a defence;

(x) *Howard v. Hopkyns*, 2 Atk. 371.

(y) *Butler v. Powis*, 2 Coll. 156.

(z) See *Whitmel v. Farrel*, 1 Ves. 256, 258.

(a) Sug. 245, and see cases there referred to.

(b) *Supra*, Ch. III. and IV. As to how far the purchases of several lots are connected, *vide infra*, p. 507. And see the judgment in *Knatchbull v. Grueber*, 1 Mad. 167.

(c) See S. C., ib. 153, 165.

[1] See *Trelfair v. Trelfair*, 2 Des. Rep. 271; 4 Pick. 1; ib. 507; 7 ib. 301; 4 ib. 507; 6 ib. 1, 71.

[2] If the part to which the seller has a title, was the purchaser's prin-

## Ch. XVIII.

public nuisance.

[\*498]

Destruction of estate not a purchaser's defence.

4th. Matters relating to the title:—want of, considered as a vendor's defence.

It was considered, in a recent case, that the existence of a public nuisance in the immediate neighborhood of a house agreed to be taken as a residence, and rendering it unfit for that purpose, its existence, however being unknown to either party, although easily ascertainable by the vendor, is no defence to his suit for specific performance, although it will induce the court to try the case strictly. (d)

We have already seen (e) that the accidental destruction or deterioration of the estate subsequently to the contract, is no defence to the vendor's bill for specific performance.

As to the 4th of the above heads.—Want of title to the estate is a defence which may occasionally be available as well to vendor as to purchaser; as a general rule, however, a vendor will be compelled to pay his interest, if an imperfect one, in the estate, if the purchaser choose to accept it without compensation; (f) [1] so, he will be compelled to make good the contract out of any interest which he has subsequently acquired; (g) or to procure the concurrence of parties who are bound to convey at his request, (h) e. g., trustees of the legal estate; (i) so, if enti-

(d) *Lucas v. James*, 7 Ha. 410, 418.

(e) *Supra*, p. 116.

(f) See *Harnett v. Yielding*, 2 Scho. & Lef. 554; Sug. 242.

(g) See cases cited *supra*, p. 360; and *Carn v. Michell*, 10 Jur. 910. V. C. E.

(h) See 1 Mad. 11.

(i) See Sug. 242; *Crop v. Norton*, 2 Atk. 74, 75.

cipal object, or equally his object with the part to which a title cannot be made, and is itself an independent subject, and not likely to be injured by the other part, equity will compel the purchaser to take it at a proportionate price. The question generally arises, where the part to which a title cannot be made is comparatively small; for if it be a considerable portion, that upon the face of it would be deemed material; for when a man buys a large estate, he must be supposed to want what he buys; on the other hand, it matters not how trifling the subject is, if it is necessary to the enjoyment of the rest, or was the purchaser's object in his purchase.

[1] See *Hepburn v. Auld*, 5 Cranch, 262; *Butler v. O'Hear*, 1 Des. 382; *Fisher v. Cay*, 2 Bibb, 434; *Hepburn v. Dunlop*, 1 Wheat, 179; *Johnson v. Hobson*, 1 Lit. 314; *Kelley v. Bradford*, 3 Bibb, 317; *Roach v. Rutherford*, 4 Des. 126.

tled to an equity of redemption, he will be compelled to redeem the mortgage, and obtain a conveyance from a mortgagee; <sup>Ch. XVIII.</sup> (k) so, a tenant in tail in remainder will be decreed to convey a base fee, and covenant to bar the remainders over upon becoming tenant in tail in possession; (l) but equity will not compel a vendor to procure the concurrence of parties whose concurrence he has no right to require: *e. g.*, a husband to procure the concurrence of his wife, (m) [2] or son, (n) except perhaps, where

Cases in which it is available.

(k) Sug. 253.

(l) *Lord Bolingbroke's case*, cited 1 Scho. & Lef. 19, n.

(m) *Emery v. Wase*, 8 Ves. 505, 514; *Howel v. George*, 1 Mad. 1, 6; see *Jordan v. Jones*, 2 Ph. 170.

(n) *Howel v. George*, *ubi supra*.

[2] If a husband agree to convey his wife's estate, he will, according to some cases, be compelled to perform the agreement *in specie*, because it has been said it is presumed that the husband, where he covenants that his wife shall convey, has first gained her consent for that purpose; but this does not seem to be the true ground, for although the wife swear by her answer, that she never assented to the agreement, yet the husband will not be let off. The principle upon which the court proceeds, seems to be this, that if a person undertakes that another shall do a certain act, he is bound to procure him to perform it; and therefore, where a father covenanted that his son, who was then under age, should convey lands to a purchaser, he was decreed to procure the son to convey on his coming of age. There have been instances of committing the husband, until the wife should convey the estate; but if he should make it appear that he could not prevail on his wife to join, it seems that he must of necessity be discharged, upon placing the vendee in the same situation, as if the agreement had never been executed. In *Emery v. Wase*, 8 Ves. jun. 505. Lord Eldon seemed to be of opinion that if this doctrine were *res integra*, he should hesitate before he would hold the husband bound to procure the wife to join. He said that if a man chooses to contract for the estate of a married woman, he knows the property is hers. The purchaser is bound to regard the policy of the law; and what right has he to complain, if she, who, according to law, cannot part with her property but by her own free will, takes advantage of the *locus poenitentiae*; and why is he not to take his chance of damages against the husband? And after showing the absurdity which must arise by adhering to the contrary doctrine, he added that there was difficulty enough to make him pause, before he should follow some of the authorities. Upon this subject, Sugden (1 Sug. on Vend. p. 240,) remarks—"it now seems perfectly clear, that this jurisdiction is to be very sparingly exercised, and that equity will eagerly seize on any reasonable ground as a bar to the aid of the court. Indeed, in a late case, where an action was brought on a covenant by a husband, that he and his wife would levy a fine, and he could

he has expressly agreed to procure such concurrence ;(o) or a tenant for life to "procure the concurrence of trustees for sale of the reversion, they being under no obligation to comply with his request ;(p)[1] nor will it compel him

(o) Sug. 231, and cases there cited, but the point seems very doubtful; see Sug. 232.

(p) *Thomas v. Dering*, 1 Keen, 729.

not procure her concurrence, the learned chief justice said that the covenant upon which the action was brought was such as the court of chancery would not now enforce; and he added that nothing could be more absurd than to allow a married woman to be compelled to convey through the fear of her husband being sued and thrown into jail, when the general principle of the law is that a married woman shall not be compelled to levy a fine. This observation of Lord Chief Justice Mansfield must have considerable influence on this subject, although, as we have seen, it is not settled that equity will, in every case, refuse to compel the husband to procure his wife's concurrence." See 1 Edw. Ch. Rep. 1; *Ketchum v. Everton*, 13 Johns. Rep. 358; *The Corporation of Schenectady v. Eps*, 12 Johns. Rep. 436; *Jones v. Gardner*, 10 Johns. Rep. 267.

[1] Where a power of sale is given to trustees, although to be executed at the request of the tenant for life, it is discretionary in them whether they will exercise the power, and therefore, if they think it disadvantageous to their *cestuis que trust* they cannot be compelled to adopt a contract entered into by the tenant for life, for sale of the estate.

In the case cited in the text, a tenant for life under a settlement, with full knowledge of the nature of his title, entered into a contract for sale of the estate, as owner, by letters to a purchaser who was ignorant of the title, and then desired to withdraw from the contract, and the trustees, in whom a power of sale was vested, refused to adopt the contract; the purchaser required the seller to convey to him his estate for life, which was without impeachment of waste, and his reversion in fee after an estate tail in his son, but this was refused. The court observed, that without derogation in any respect from the jurisdiction, it was apparent that the court would not, in every case, compel a vendor to convey such estate as he could. And upon the general principle that the court will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract, the court, before directing the partial execution of the contract, by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding might affect the interests of those who were entitled to the estate, subject to the limited interest of the vendor. The vendor had a life estate, without impeachment of waste, with remainder to his sons in tail male, and having regard to the settlement, and the protection intended to be afforded to the objects of it. Conceiving that the consequence of a partial execution of this contract might be prejudicial to those objects, and considering also that nothing had been done upon the contract, so that the purchaser, though suffering the disappointment

to perfect the title by exercising a power of purchasing Ch. XVIII. and settling another estate in lieu of that which he has contracted to sell ;(*q*) or to purchase and convey the tithes of an estate contracted to be sold as tithe free.(*r*) It has even been held, that where a tenant for life, with the ultimate reversion in fee, contracted, as it appeared to the court, merely as the agent of his trustees, (who had a power to sell the fee simple,) he was not bound, upon the contract being held void as against the trustees, to make it good out of the fee simple, which had subsequently vested in

(*q*) <sup>2</sup>*Howel v. George*, 1 Mad. 1.

(*r*) *Todd v. Gee*, 17 Ves. 273.

of not making himself the owner of an estate he desired to possess, had sustained no damage for which compensation might not be given by a jury, it appeared to the court that a conveyance of the vendor's life estate and ultimate reversion to the purchaser, ought not to be decreed.

Upon this, Sugden (1 Sug. on Vend. p. 356,) remarks—"There is no doubt great difficulty in these cases, but in the case just referred to, no circumstance existed on the part of the purchaser upon which relief could be refused to him against the seller. It was not denied that the seller was bound by the contract, and he took advantage of the state of the title to avoid the specific performance of a contract which he had entered into with full knowledge that he could not bind the whole fee, although the purchaser was not aware of the circumstance, and the seller even concealed for a time the objection made by the trustee to adopt the sale. Nor if the seller, according to the general rule, was bound to convey what interests he could at a proportionate price, did the difficulty of valuing those interests afford any solid objection to the relief. The estimate for life was without impeachment of waste, and the purchaser, no doubt, might sell the timber, but the court ought not, it is conceived, in such a case, to look at the interests of the tenant in tail, nor, indeed, could it protect them, for the tenant for life might fell the timber, or sell his life estate, with the right to cut it the next hour, and equity could not refuse to perform such a contract, however injurious it might prove to the tenant in tail. Indeed, in this case the timber was not of large value, and the tenant for life, pending the suit, employed workmen to cut it, although, of course, he was stopped by injunction, upon the purchaser's application. If a tenant for life *bona fide* apprehending that the trustees of the settlement will adopt his contract, sell, meaning only to concur in a sale of the fee, that might be a good defence in equity, against a partial execution of the contract by the tenant for life alone. But such sales, where the settlement is concealed, deserve no favor, for there is no mutuality; the trustees, by their election, may force the purchaser to complete, although he cannot compel them to join, and they are too frequently mere instruments in the hands of the tenant for life, who procures them to concur in the sale or reject it, just as best suits his own views."

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himself by the failure of the intervening limitations ;(s) but this decision ought perhaps to be only cautiously followed ;(t) and, of course, the decision was different, when a tenant for life, similarly circumstanced, contracted in his own name, as if seized in fee simple ;(u) but the court will not decree specific performance by directing an invalid assurance to be executed by a tenant for life, which might encumber and embarrass remaindermen.(w)

Vendor  
when com-  
pelled to  
convey part  
of the estate  
with an  
abatement.

Where the want of title is only partial,—i. e., where it affects only part of the estate, or only part of that interest in it which was agreed to be sold,—the question arises, whether the vendor can resist the purchaser's claim to specific performance with a compensation, or, to speak more accurately, an abatement of the purchase-money. This right generally, but not universally,(x) exists in each class of cases :(y) thus, the want of title to even a considerable \*part of the estate is not necessarily a reason why the vendor should not convey the residue,(z)[1] but, cases

[\*500]

(s) *Mortlock v. Buller*, 10 Ves. 292, 316.

(t) See 2 Ball & B. 60.

(u) *Buller v. Powis*, 2 Coll. 156.

(w) *Ellard v. Lord Landaff*, 1 Ball & B. 241 ; see 251.

(x) 1 Ves. & B. 353.

(y) 10 Ves. 316 ; 17 Ves. 401 ; 1 Ves. & B. 353 ; 3 Ves. & B. 192 ; 4 Sim. 127.

(z) *Western v. Russell*, 3 Ves. & B. 187, 192.

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[1] In every case where an agreement would be in part executed in favor of a vendor, there is much greater reason to afford the aid of the court, at the suit of the purchaser, if he be desirous of taking the part or interest to which a title can be made. And a purchaser may, in some cases, insist upon having the part of, or interest in, an estate to which a title is produced, although the vendor could not compel him to purchase it: it is true generally, but not universally that a purchaser may take what he can get, with compensation for what he cannot have. If a man, having partial interests in an estate, chooses to enter into a contract representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall have the benefit of the contract. For the person contracting under these circumstances, is bound by the assertion in his contract: and if the vendee chooses to take as much as he can have, he has a right to that, and an abatement. No one can dispute the proposition that if a man agrees to sell me an estate in fee simple, I can insist upon his giving me all the title he has: he cannot say he will



might occur, where, on the ground of hardship, equity Ch. XVIII. would refuse to assist a purchaser; as in the case put by Sir E. Sugden, (a) of a vendor showing a good title to his mansion-house and park, but having no title to a "large adjoining estate held and sold with it." In a case before Sir L. Shadwell, V. C., where upon a contract to sell the entirety of a lace manufactory, it appeared that the vendors had only nine-sixteenths, and that the remaining shares clearly belonged to another party, who had also a charge on the vendor's shares for a sum nearly equal to the purchase-money, the court refused the purchaser specific performance with an abatement: (b) a decision which Sir E. Sugden suggests may be referred to the nature of the property, but otherwise disapproves of: (c) he seems, however, to consider that the decision would have been correct had the remaining shares been held by the vendors under a defective title. [1] In a late case, the same learned judge, when the vendors had agreed to sell two-sixths of certain leaseholds, and then found that they had only four-twentieths, decreed specific performance with an abatement; observing, "this is very unlike a

(a) Sug. 359.

(b) *Wheatley v. Slade*, 4 Sim. 126.

(c) Sug. 360.

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give me nothing because he cannot give me all I have contracted for. If he contracts to sell a fee simple and has only a term of years, I have a right to that term, if I think fit. See 1 Sug. on Vend. p. 351, 352.

[1] The following are the remarks of Sir E. Sugden to which allusion is here made "this decision may, perhaps, be referred to the nature of the property, although the sellers' object appears to have been to get rid of one sale in order to join in another—otherwise it might be difficult to support it; for whatever was really the number of the shares to which the sellers were entitled, they were bound to that extent, to pay the charges, and it is no objection to the performance of a contract that the charges on the estate, will, contrary to the seller's expectation, exhaust the purchase-money. If the case be reduced to the simple one, that the sellers had only nine-sixteenths, although they considered they had the entirety, the authorities would seem to show, that the purchaser had a right to those shares at a price *pro tanto*; no hardship would have been thrown upon the sellers; they would not have had the other shares left on their hands with a bad title, for the nine-sixteenths, were all the shares they possessed; the owner of the other seven-sixteenths, was a party to the suit, and his title was undisputed by the sellers of the nine-sixteenths.

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case where parties contract to sell the whole, but can only sell a part:“(d) from which remark, as in the case before the court there was no question as to leaving part of the property in the hands of the vendors with a bad title, it may be inferred that his honor, upon general principles, approved of his former decision. It seems, however, difficult to understand why specific performance should be refused in the former case; or to distinguish it from the case put by Lord Hardwicke, of two tenants in common agreeing to sell the \*entirety of an estate, and one of them dying, and a decree being made against the survivor in respect of his share, although the contract could not be enforced against the representatives of the deceased: (e) nor, it is submitted, can the defence be safely relied on by a vendor, who, having contracted to sell only shares in, and not the entirety of, a property, is found to have a defective title to *some* of such shares.

[\*501]

In another case, before the same learned judge, it was held, that a condition for rescinding the contract, if counsel should be of opinion that a marketable title could not be made, enabled the vendor to rescind, upon counsel rejecting the title to one-third of the property (f)[1]

(d) *Jones v. Evans*, 12 Jur. 664.

(e) See *Att.-Gen v. Day*, 1 Ves. 218, 224.

(f) *Williams v. Edwards*, 2 Sim. 78.

[1] In the case here cited, there was a condition that errors in description should not annul the contract, but that there should be an abatement or equivalent, followed by a stipulation that if the counsel of the purchaser should be of opinion that a marketable title could not be made by the time stipulated, the agreement should be void and delivered up to be cancelled; it appeared that the seller could make a title to two-thirds only of the freeholds sold in fee simple, and that he had only a life interest in the remaining one-third, and in the copyholds sold. And it was held that the purchaser was not entitled to a specific performance with an abatement. For this title did not of course fall within the condition as to errors of description, and the clause avoiding the contract, was the contract of both the vendor and purchaser. The court considered that they might both think it equally to their interest that the agreement should be put an end to if the counsel of the purchaser should be of opinion that a marketable title could not be made. There appeared to be nothing unreasonable in that. There might be circumstances which might make it very proper for both parties to insert that term, and as it was the contract of both par-

Of course, no such question can be raised by a vendor, CH. XVIII.  
when, upon the purchase of several lots by the same purchaser, the title to one or more of such lots is found to be defective.

So, in general, when the vendor's *interest* is less than what he professes to sell, the purchaser may take what he can have, with an abatement; <sup>(g)</sup> as in the case put by Lord Eldon, <sup>(h)</sup> of a man contracting to sell the fee simple, and having only a term for one hundred years: so, where the contract was, in effect, for an absolute term of twenty-one years, and it was found that the actual term might determine by the cesser of certain lives, specific performance was decreed, with an abatement in respect of the difference between the absolute and defeasible interests: <sup>(i)</sup> there was a similar decision where a term was sold with the benefit of A.'s covenants for renewal, and such covenants were found to "be not absolute but binding only a \*contingent portion of his assets: <sup>(k)</sup> so, where the agreement being for a term of thirty-one years, a title could be shown only to a term of twenty-one years, and a covenant for renewal of an additional term of ten years: <sup>(m)</sup> so, it was admitted by Lord Eldon, (the case before him being that of a contract by a tenant for life for sale of the fee, <sup>(n)</sup> that if a vendor, having a partial interest in an estate, enter into a contract, representing and agreeing to sell it as his own, the purchaser may take what he can have with an abatement: however, in a case <sup>(o)</sup> before Lord Langdale, M. R., when a tenant for life, with re-

Vendor, when compelled to convey partial interest in the estate, with an abatement.

[\*502]

(g) See *Dyas v. Cruise*, 2 J. & L. 460.

(h) *Wood v. Griffith*, 1 Will. Ch. Ca. see 44; Sug. 346.

(i) *Dale v. Lister*, cited 16 Ves. 7; and see p. 11.

(k) *Milligan v. Cooke*, 16 Ves. 11, 12: but *semble*, the Court will not now consider the comparative values of covenants; see *Ridgway v. Gray*, 1 Mac. & G. 109; and *Law v. Urwin*, 16 Sim. 390.

(m) *Hanbury v. Litchfield*, 2 Myl. & K. 629.

(n) *Mortlock v. Buller*, 10 Ves. 315.

(o) *Thomas v. Dering*, 1 Keen, 729.

ties, the court could not make a new contract for them. The parties themselves had stipulated, that in a given event, which happened, the agreement should be void.

Ch. XVIII. mainders to his first and other sons in tail, with remainder to himself in fee, contracted to sell the fee simple, speculating on the consent of the trustees for sale, which consent was eventually withheld, his lordship refused to enforce specific performance to the extent of the life estate and remainder in fee, and with an abatement; but the decision is disapproved of by Sir E. Sugden;(p)[1] and,

(p) Sug. 351; as to the difficulty of fixing the amount of abatement being a reason for refusing relief, see *White v. Cuddon*, 8 Cl. & Fin. 766, 792.

[1] In this case the court observed, that, without derogation, in any respect, from the jurisdiction, it was apparent that the court would not, in every case, compel a vendor to convey such estate as he could. And, upon the general principle that the court will not execute a contract, the performance of which is unreasonable, or would be prejudicial to persons interested in the property, but not parties to the contract, the court before directing the partial execution of the contract, by ordering the limited interest of the vendor to be conveyed, ought to consider how that proceeding might affect the interests of those who were entitled to the estate, subject to the limited interest of the vendor. The vendor had a life estate, without impeachment of waste, with remainder to his sons in tail male, and having regard to the settlement, and the protection intended to be afforded to the objects of it. Conceiving that the consequence of a partial execution of this contract, might be prejudicial to those objects, seeing the difficulty of ascertaining upon satisfactory grounds, the just amount of abatement from the purchase-money, and considering also that nothing had been done upon the contract, so that the purchaser, though suffering the disappointment of not making himself the owner of an estate he desired to possess, had sustained no damage, for which compensation might not be given by a jury, it appeared to the court, that a conveyance of the vendor's life estate and ultimate reversion to the purchaser, ought not to be decreed. Upon this, Sugden (1 Sug. on Vend. p. 356,) remarks; "There is no doubt, great difficulty in these cases; but in the case just referred to, no circumstance existed on the part of the purchaser upon which relief could be refused to him against the seller. It was not denied that the seller was bound by the contract, and he took advantage of the state of the title to avoid the specific performance of a contract which he had entered into, with full knowledge that he could not bind the whole fee, although the purchaser was not aware of the circumstance, and the seller even concealed, for a time, the objection made by the trustee to adopt the sale. Nor, if the seller, according to the general rule, was bound to convey, what interests he could, at a proportionate price, did the difficulty of valuing those interests, afford any solid objection to the relief. If a tenant for life *bona fide*, apprehending that the trustees of the settlement will adopt his contract, sell, meaning only to concur in a sale of the fee that might be a good defence in equity, against a partial execution of

in a subsequent case, (q) his lordship appears to refer to his former judgment as if ~~not~~ altogether satisfied of its propriety: and in a recent converse case, of a person entitled in fee, subject to a life estate, agreeing to sell the fee simple in possession, speculating on the concurrence of the tenant for life, which was withheld, specific performance, with an abatement in respect of the life estate, was decreed by V. C. K. Bruce; and the vendor, having knowingly offered for sale an interest to which he was not entitled, was not allowed to avail himself of a condition purporting to reserve the right of rescinding the contract if the title should prove defective. (r)

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Indemnity,  
neither  
given nor  
taken com-  
pulsorily.

Vendor's  
and pur-  
chaser's  
rights in  
respect of  
abatement  
are not re-  
ciprocal.

[503]

In two cases above referred to, (s) where the vendor's title was only contingently defective, it was held, that the purchaser might take the estate with an indemnity; but it has been settled, by subsequent decisions, that an indemnity will not be enforced against either party, (t) unless it be provided for by special agreement. (u)

And matters which would not be considered fit subjects for compensation as against a purchaser, may entitle him to an abatement of purchase-money if he elect to take the estate; e. g., the existence of mining rights, (w) or rights

(q) *Graham v. Oliver*, 3 Beav. see p. 128; and see *Neale v. Mackenzie*, 1 Keen, 474.

(r) *Nelthorpe v. Holgate*, 1 Coll. 203.

(s) *Dale v. Lister*, cited 16 Ves. 7; *Milligan v. Cooke*, 16 Ves. 1.

(t) *Balmanno v. Lumley*, 1 Ves. & B. 224; *Baton v. Brebner*, 1 Bli. 42, 66; *Aylett v. Ashton*, 1 Myl. & C. 105; *Neuailleur, Flight*, 7 Beav. 521; *Ridgway v. Gray*, 1 Mac. & G. 109, 111.

(u) *Walker v. Barnes*, 3 Mad. 247; *Aylett v. Ashton*, 1 Myl. & C. 104.

(w) *Seaman v. Vawdrey*, 16 Ves. 390.

the contract, by the tenant for life alone. But such sales, where the settlement is concealed, deserved no favor, for there is no mutuality; the trustees, by their election, may force the purchaser to complete, although he cannot compel them to join, and they are too frequently mere instruments in the hands of the tenant for life who procures them to concur in the sale or reject it, just as best suits his own views. If, in a case of this nature, the purchaser, on the faith of the agreement, puts himself in a situation from which he cannot extricate himself, and is therefore willing to forego a part of his agreement, that is a circumstance to induce a court of equity to give relief."

CH. XVIII. of common over the estate, (x) or the want of a road which the vendor had agreed but was unable to make. (y)

Right to abatement lost, by contracting for the estate with notice of the defect;

or by partial misrepresentation.

If, however, the purchaser, at the time of entering into the contract, be aware of the existence of the outstanding interest, or that the vendor is agreeing for more than he can give, no abatement of purchase-money will, it is conceived, be allowed. (x)

And where a plaintiff had obtained an agreement for an exchange with immediate possession, under a false representation to the defendant that the tenants of the latter would accede to the arrangement, he was not allowed to claim specific performance subject to the tenant's interests. (a) [1]

[\*504] Vendor how far bound to make good interest contracted for, out of his own higher interest.

\*It may occasionally happen, that the vendor's interest is found to exceed that which he contracted to sell, in which case he must, as a general rule, make good the latter to the best of his ability; for instance, where a vendor, in fact, seized in fee, contracted to sell the estate as copyhold, stating it to be equal in value to freehold, it was held that he ought (but for other grounds of defence, to have conveyed the freehold; (b) it has, however, been

(x) Sug. 353.

(y) *Peacock v. Penson*, 11 Beav. 355.

(z) See *Lawrenson v. Buller*, 1 Sch. & Lef. 13, 19; *Harnett v. Yeilding*, 2 Sch. & Lef. 549, 560; *Nelthorpe v. Holgate*, 1 Coll. 203, 215.

(a) *Clermont v. Tasburgh*, 1 Jac. & W. 112.

(b) *Twining v. Morrice*, 2 Bro. C. C. see 331.

[1] If there have been misrepresentation on the part of the purchaser, he cannot insist upon having the estate, although he is willing to take subject to the outstanding interests. This is the case of *Clermont v. Tasburgh*, which is cited in the text. Upon a treaty for an exchange, Clermont informed Tasburgh that the tenants of the latter were agreeable to the exchange, and thereupon the agreement was made which stipulated for possession on both sides. It appeared, upon bill filed by Clermont, that the tenants had not consented. The bill sought that Tasburgh should buy out his tenants, or that the value should be proportionally reduced. The opinion of the court being against the plaintiff, he offered to waive the part of the contract which stipulated for possession, and not to require the tenants to be bought out. But this was denied to him, because as the contract was obtained by misrepresentation, it was void both at law and in equity. When an agreement is obtained by fraud, the effect is not to cut it down or modify it only, but it vitiates it *in toto*, and the party who has been drawn in is totally absolved from obligation.

held, that on an agreement to assign a lease, equity cannot decree an underlease, although the assignment would induce a forfeiture, since the vendor's motive to the assignment may have been to escape the rent and covenants; (c) but the defence, as Sir E. Sugden remarks, is one which could seldom be set up by a vendor. (d)

If the purchaser be unwilling to complete with an abatement, he may resist specific performance on the ground of the tenure of the property, or of a material part of it, varying from that to which he is entitled under the contract; e. g., he will not be compelled to take a term, (even for 4000 years,) (e) [1] or a copyhold, (f) or mere sheepwalks, instead of a freehold; (g) or on the ground of the property being held in a manner different from that which is expressed or implied in the contract; e. g., he will not be compelled to take an assignment of an underlease, instead of an original lease; (h) or of a redeemable, instead of an absolute interest; (i) [2] or of an improved,

Want of title, where a defence for purchaser declining an abatement.

As where estate is of different tenure;

or is held in a different manner;

(c) *Anon.* Sug. 342.

(d) *Ibid.*

(e) *Drewe v. Corp.* 9 Ves. 368; and see *Fordyce v. Ford*, 4 Bro. C. C. 494; see *Wright v. Howard*, 1 Sim. & St. 190.

(f) *Twining v. Morrice*, 2 Bro. C. C. see p. 331; Sug. 343; as to what is included in the contract, in the absence of any express description, *vide supra*, 51, *et seq.*

(g) *Vancouver v. Bliss*, 11 Ves. 458; see p. 466.

(h) Sug. 341.

(i) *Coverley v. Burrell*, Sug. 340.

[1] In this case, where the subject of sale was described to be an annuity of so much payable out of the tolls of Waterlow Bridge, the court considered that the purchaser would make some inquiry as to the annuity; but as the Bridge Act did not speak of any power to redeem the annuities to be granted, and the annuity was made subject to redemption, it was held that the contract was not binding on the purchaser; and the court was of opinion that the sellers should be strictly bound to disclose the real nature of the contract.

[2] In the case of *Drewe v. Corp.*, which is here cited, the vendor was entitled to an absolute term of four thousand years in the estate, and also, to a mortgage of the reversion in fee, which was forfeited, but not foreclosed. It was decided that the purchaser who had contracted for a fee, was not bound to take the term of years. Nor was he compelled to take the title on the ground of the vendor having a forfeited mortgage in fee of the reversion, although it was evidently highly improbable that any one would ever willingly redeem a reversion expectant upon an absolute term of four thousand years.

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or no title is shown to the same extent of interest as is contracted for ;

[\*505]

or no title is shown to a material part of the estate ;

instead of a ground rent ;(k)[3] or on the ground of no title being shown to that extent of interest which he contracted for : *e. g.*, "he cannot be compelled to take, instead of an estate in possession, a reversion expectant on a life estate,(l) or on a subsisting lease ;(m) or a life estate, and (subject to an intervening estate tail,) the remainder in fee, instead of the fee simple in possession ;(n) nor, having contracted for the entirety, can he be compelled to take undivided parts of the estate,(o) even although the vendors were tenants in common of the entirety ;(p) and the same decision has been come to, where on a contract for two-sevenths of an estate, a title could only be made to one-seventh ;(q) nor can he, on the purchase of a leasehold interest, be compelled to accept a term "considerably less"(r) than that contracted for ; *e. g.*, a term for six instead of sixteen years ;(s)[1] or on the ground of no title being shown to a material part of the estate ; such

(k) *Stewart v. Alliston*, 1 Mer. 26.

(l) *Collier v. Jenkins*, You. 295.

(m) Sug. 346.

(n) Sug. 349.

(o) *Dalby v. Pullen*, 3 Sim. 29 ; affirmed, 1 Russ. & M. 296.

(p) *Att.-Gen. v. Day*, 1 Ves. 218, 224.

(q) *Roffey v. Shallcross*, 4 Mad. 227.

(r) Sug. 341.

(s) *Long v. Fletcher*, 2 Eq. Ca. Abr. 5.

[3] In this case, where a lease at rack-rent, was described as one at a ground rent, Lord Eldon treated the case just as if there had been no such condition. The subject of the contract he observed, did not answer the vendor's description of it, and that in a point so material as to exclude the doctrine of compensation, which ought never to be applied to a case like the present. He refused an injunction ; and added, that even if a court of law should judge otherwise, as to the representation, he should have great difficulty in decreeing a specific performance, where the description was, at the best, of so ambiguous a nature, that it could not, with certainty, be known what it was that the purchaser imagined himself to be contracting for.

[1] In this case, A. pretending that he had a term of sixteen years to come in a house, agreed to sell it to B., and B. paid 100*l.* part of the consideration money down. B. entered, but finding that A. had only a term of six years in the house, brought his bill to have an account, his money refunded, and the bargain set aside ; and accordingly, B. was decreed to account for the profits, and the consideration money to be refunded, and B. upon his own account, to have tenant allowances made him.



materiality consisting, either in the proportion which such part bears to the entirety, or on its being important with regard to the enjoyment of the residue, or as possessing an adventitious value in the estimation of the purchaser ;(t) *e. g.*, "a purchaser cannot be compelled to take compensation for a large portion of the estate ;"(u) nor, having entered into a single contract for two estates, could he probably be compelled to take one without the other ;(w) although the estate with the defective title were let upon and sold subject to fee farm grant at a large rent ;(x)[2] so where, on the purchase of a mansion and 700 acres, the title to 12 acres proved defective, such 12 acres being opposite the park gate and containing brick earth, which rendered it probable that \*they might be built upon, the purchaser was held free ;(y) so also where, on the purchase of a wharf and jetty, no title could be made to the jetty ;(z) or on the ground of the existence of incumbrances or liabilities which would interfere with the en- Ch. XVIII.  
[\*506]  
or where incumbrances or liabilities exist which

(t) See 1 Mad. 167.

(u) Sug. 359.

(w) See *Prendergast v. Eyre*, 2 Hog. 81.

(x) See *S. C.*, p. 94 ; Sug. 358.

(y) *Knatchbull v. Grueber*, 1 Mad. 153 ; 3 Mer. 124, see 141 ; and see 2 Myl. & K. 728.

(z) *Peers v. Lambert*, 7 Beav. 546 ; and see Sug. 357, for references to other cases in which some earlier decisions of a contrary tendency have been disapproved of.

[2] In the case here referred to, lands containing seven hundred acres were put up to sale as land subject to a fee farm grant of 100*l.* per annum, whereas the seller's title was to a fee farm rent of that amount, issuing out of those lands, and it was contended that the sale being of land subject to a fee farm grant, it was to be considered as a rent charge chargeable on the other lands sold, and that the purchaser ought to be compelled to accept compensation. The argument proves how impossible it was to maintain the claim. For the purchaser bought the lands subject to a rent charge, and the seller had not got them, but had a rent charge issuing out of them. There was, therefore, no charge to throw upon the other lands ; but the question simply was, whether a man having purchased a fee simple estate, subject to a perpetual rent charge, instead of the estate itself ; and, of course, it was held that he could not. The lands were adjoining to other property belonging to the purchaser, and he desired to possess them, but without that circumstance, he had a clear right to rescind the sale.

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would affect  
his enjoy-  
ment;

or matters  
exist which  
increase the  
proposed  
liability of  
the pur-  
chaser.

[\*507]

joyment of the estate ; *e. g.*, liabilities to tithe, (if the estate is sold as tithe free or subject to a modus or commuted rent charge,)(*a*) to rights of mining,(*b*) common,(*c*) or waterway with power of entry for the purpose of making, opening, or cleansing water-courses, or to rights of entry for making reservoirs, or of planting ladders for the repair of adjoining houses,(*d*) or to a right of sporting,(*e*) or to the repairs of the chancel of a church,(*f*) or to quit rents or rent-charges, if of a large amount,(*g*) have been held to be defects which do not admit of compensation. Upon a similar principle, it has been held, at law, that a purchaser having contracted for the assignment of a subsisting lease, cannot be required to accept a new lease as original lessee ; his liability being greater under the lease than it would be under the assignment ;(*h*) \*so where, on the purchase of leaseholds, the lease was found to contain covenants to build additional houses, and to deliver them up at the end of the term, and the houses had not been built, but the covenant to build had been waived, it was held that the liability under the covenant to deliver up at the end of the term was a sufficient defence to the suit, although such liability might have been escaped by

(*a*) *Ker v. Clobery*, Sug. 366 ; *Binks v. Lord Rokeby*, 2 Sw. 222. The question of tithe free or not, has been said to be a question of fact and not of title ; *Smith v. Lloyd*, 2 Sw. 224, *n. sed qu.*, whether this statement, although theoretically accurate, is correct for practical purposes. Freedom from the tithe is a fact which does not relate to the physical condition of the property, and must, nevertheless, be proved by the vendor before he can be said to have shown a good title to the estate as described in the contract.

(*b*) See *Seaman v. Vawdrey*, 16 Ves. 390 ; Sug. 353.

(*c*) *Ibid.*

(*d*) See *Shackleton v. Sutcliff*, 1 De G. & S. 609, where only about four and a half out of thirty acres contracted for were subject to the easements.

(*e*) Sug. 352 ; see *Burnell v. Brown*, 1 Jac. & W. 172.

(*f*) *Forteblow v. Shirley*, cited 2 Sw. 223.

(*g*) *Portman v. Mill*, 1 Russ. & M. 696.

(*h*) *Mason v. Corder*, 2 Marsh. 332 ; see Sug. 341, where the case seems to be cited doubtfully.

assigning the term to a pauper even only a day before its termination.<sup>(i)</sup>[1] Ch. XVIII.

Where only part of an estate is affected by a liability which, if affecting the entirety, would enable the purchaser to resist specific performance, the purchaser's right to avoid the contract would seem to depend upon whether the part so affected is material to the enjoyment of the residue.

Or affect the enjoyment of a material part of the property.

Where, on the purchase of several lots by the same person, the title to one or more proves defective, this may or may not, according to circumstances, be a ground for the purchaser's resisting specific performance in respect of the remaining lots: an express agreement that the purchaser shall not take any unless he can have all, will be sufficient to blend the whole into one contract: "but the same complication may be effected, or rather evidenced, without any such agreement. It is a question of circumstances: the lots may be connected from their nature; it may be shown that the purchase of the one was made with reference to the other. A mere suggestion by the party—a mere statement of his inclination or fancy—will not be sufficient: nor may the proof of anything of a private nature, not known to the vendor, suffice: but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have been no express statement that he was to take none if he might not have all."<sup>(k)</sup>

Defect in title to one of several lots, how far a defence in respect of remaining lots.

[\*508]

(i) *Nouaille v. Flight*, 7 Beav. 521.

(k) *Per* Lord Brougham, *Casamajor v. Strobe*, 2 Myl. & K., see judgment, p. 725; *Poole v. Shergold*, 2 Bro. C. C. 116; Lord Eldon's remarks in *Drewe v. Hanson*, 6 Ves. 675, as stated Sug. 363.

[1] It may be observed that in every case where an agreement would be in part executed in favor of a vendor, there is much greater reason to afford the aid of the court at the suit of the purchaser, if he be desirous of taking the part or interest to which a title can be made. And a purchaser may, in some cases, insist on having the part or interest in an estate to which a title is produced, although the vendor could not compel him to purchase it; it is true generally, *but not universally*, that a purchaser may take what he can get with compensation for what he cannot have.

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Benefits of defence, how lost to purchaser.

A purchaser will lose his right to resist specific performance on the ground of the estate being of a different tenure, *(l)* or subject to a liability affecting its beneficial enjoyment, (e. g., a right of sporting,) *(m)* or of there being no title to a material part of it, *(n)* or of a variation from the description in the particulars, *(o)* if, after having become acquainted with the defect, he, without insisting thereon, proceed in the treaty; *(p)* or, *a fortiori*, take possession: *(q)* or if, although insisting on the objection, he take possession and endeavor to prevent the vendor from removing the defect. *(r)*

Defects in title, which are not available as a defence to purchaser:

Limited right of common:

small quit-rents or rent-charges;

[\*509] tithe—when the freedom from tithe

And a purchaser has not been allowed to resist specific performance, on the ground that the estate having been sold with what was represented in general terms as an unlimited right of common, the same proved to be a right of common only for sheep; *(s)* or, on the ground of the estate being subject to quit-rents or rent-charges of small amount. *(t)* [1]

So, where, on the sale of 140 acres, the particulars \*stated that about 32 acres were tithe free, and no evi-

*(l)* *Fordyce v. Ford*, 4 Bro. C. C. 494.

*(m)* *Burnell v. Brown*, 1 Jac. & W. 168.

*(n)* See *Drewe v. Hanson*, 6 Ves. 679.

*(o)* *Dyer v. Hargrave*, 10 Ves. 505, 508.

*(p)* 4 Bro. C. C. 498; 6 Ves. 679; 10 Ves. 508.

*(q)* 1 Jac. & W. 168.

*(r)* See *Calcraft v. Roebuck*, 1 Ves. jun. 221.

*(s)* *Howland v. Norris*, 1 Cox, 59.

*(t)* See *Esdaille v. Stephenson*, 1 Sim. & St. 122; *Portman v. Mill*, 1 Russ. & M. 696, and see Sir E. Sugden's remarks (V. & P. 354,) disapproving of the decision in *Howland v. Norris*, *ubi supra*, that a tithe rent-charge of 14*l.* *per annum* was a matter for compensation. It may be remarked, that in the absence of any statement on the subject, the existence of a title-commutation rent-charge, or of tithe, must be presumed, and is no objection to the title, nor ground for claiming compensation.

[1] In *Esdaille v. Stephenson*, to which reference is here made, the court observed that rent charges were not incidents of tenure, but were created by the voluntary act of the vendor or those under whom he claims; and, that although it would be a good rule that a purchaser should not be bound to complete his purchase, unless they were noticed in the agreement or conditions of sale, yet the habit of the court had been, not to proceed upon the distinction between quit-rents and rent charges, but to compel the purchaser to complete where the rent charge is small.

dence of exemption could be produced, Lord Eldon held that the right to the tithe of this part of the property could not be considered the inducement to the purchase; and decreed specific performance with an abatement: <sup>Ch. XVIII.</sup> (u) so, where the purchaser's agent having by letter agreed to purchase an estate, consisting of a house and 19 acres of land, twelve of which were occupied by the house, offices, garden, and pleasure grounds; no mention being made of tithes; and, on a more formal contract being prepared the great tithes were inserted by the purchaser's solicitor, but without any increase of price, or further treaty on the subject, and no title could be made to the tithes, Sir J. Leach held that the tithe could have formed no part of the inducement to the contract, and decreed specific performance with an abatement; (the same having been offered by the vendor.) (w) was no part of the inducement to the purchase;

Upon the last case, we may remark, that the purchaser's agent appears to have actually entered by letter into a binding agreement to purchase subject to the tithe: as to the case before Lord Eldon, the decision ought scarcely to be considered to establish any general rule; the particulars represented 32 acres, or thereabouts, to be free from tithe generally, both small and great; and it is obvious that a purchaser buying an estate of 140 acres, say with an intention of building a residence on the land, and laying out gardens, &c., might deem it of material importance that even a very small part of the estate should be free from a liability to the payment of tithe in kind.

So, the circumstance of the estate being subject to a footway over and round it, has been held to be no defence to a suit for specific performance, its existence being patent, and the purchaser having made no inquiry on the \*subject; (x) but the decision has not been generally approved; (y) and the courts would probably, upon slight grounds, come to a different decision in any case where existence of footway.

[\*510]

(u) *Binks v. Lord Rokeby*, 2 Sw. 222.

(w) *Smith v. Tivcher*, 4 Russ. 302.

(x) *Oldfield or Bowles v. Round*, 5 Ves. 508.

(y) See Sug. 377; but see also *contra*, *Martin v. Cotter*, 3 Jo. & L. 506.

Ch XVIII. an estate was subject to a right of way which materially affected its enjoyment.

5th. Matters relating to the consideration.

Inadequacy of, when a vendor's defence.

As to the 5th of the above heads.—The amount of the consideration to be paid may be a ground of defence by either party: and, its inadequacy or excess will, of course, be determined with reference to matters as existing at the date of the contract, irrespectively of subsequent events.(z) Inadequacy of consideration is not, however, a defence available to the vendor of an estate in possession,(a) unless it can be shown to have originated in fraud, surprise, or misrepresentation, (whether wilful or not),(b) or improper concealment on the part of the purchaser,(c) or in advantage taken of the distress of the vendor,(d) or, according to Lord Eldon, “unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction;”(e) but this dictum would probably, at the present day, be hardly sustained in its full extent.(f)[1]

(z) See Sug. 310; *Poole v. Shergold*, 2 Bro. C. C. 118, 119; *Coles v. Trecothick*, 9 Ves. 246; *supra*, 357.

(a) *Coles v. Trecothick*, 9 Ves. 246; *Burrowes v. Lock*, 10 Ves. 470; *Lowther v. Lowther*, 13 Ves. 103; *Borell v. Dann*, 2 Ha. 450.

(b) 1 Mad. 81; *Brealey v. Collins*, You. 317; and see next note.

(c) See cases cited in note (a); also *White v. Damon*, 7 Ves. 30; *Western v. Russell*, 3 Ves. & B. 187; *Deane v. Rastron*, 1 Anst. 64; *Cadman v. Horner*, 18 Ves. 10; *Turner v. Harvey*, Jac. 169; *Wall v. Stubbs*, 1 Mad. 80; Sug. 312; and see Ch. III. *supra*.

(d) See *Martin v. Mitchell*, 2 Jac. & W. 413, 423; *et vide supra*, 353.

(e) 9 Ves. 246; and see Jac. 282.

(f) See Sug. 314, n.; see *Vigers v. Pike*, 8 Cl. & Fin., p. 645.

[1] On this subject, Mr. Story (1 Story's Eq. Plead., s. 244, *et seq.*) remarks: “Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting, *per se*, a ground to avoid a bargain in equity. For, courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable, or otherwise, are considerations not for courts of justice, but for the party himself to deliberate upon. Inadequacy of consideration is not then, of itself, a distinct principle of relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what

The fact of the sale being by auction, of course, much increases the difficulty of showing fraudulent inadequacy;<sup>(g)</sup>[1] and the fact of neither party being aware of the value of the estate at the time of the contract, seems to render such a defence impracticable; as in a case where a person sold, for what proved to be one-tenth only of its

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Sale by auction;  
[\*511]  
sale of unascertained interest.

(g) *White v. Damon*, 7 Ves. 30, 35; *Ex parte Latham*, *ibid*, 35, n.; *Borrell v. Dann*, 2 Ha. 450; *supra*, 357, n. (c.)

it will produce; and it admits of no precise standard. It must be, in its nature, fluctuating; and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances, which may induce him to part with it at a particular time. If courts of equity were to unravel all these transactions, they would throw every thing into confusion, and set afloat the contracts of mankind. Such a consequence would, of itself, be sufficient to show the inconvenience and impracticability, if not the injustice of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief. Still, however, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition, or some undue influence; and, in such cases, courts of equity ought to interfere upon the satisfactory ground of fraud. But then, such unconscionableness, or such inadequacy should be made out as would shock the conscience, and amount, in itself, to conclusive and decisive evidence of fraud. And, where there are other ingredients in the case, of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price, must necessarily furnish the most vehement presumption of fraud. The difficulty of adopting any other rule which would not, in the common intercourse and business of life, be found productive of serious inconvenience, and endless litigation, is conceded by civilians and publicists; and, for the most part, they seem silently to abandon cases of inadequacy in bargains where there is no fraud, to the forum of conscience, morals, and religion." See *Butler v. Haskell*, 4 Des. 651, 678; *Osgood v. Franklin*, 2 Johns. Ch. Rep. 1; *Ib.* 23; *Gregor v. Duncan*, 2 Des. 636; *Livingston v. Byrne*, on appeal, 1 John. Rep. 555.

[1] In the case of *White v. Damon*, which is here cited, although the estate was sold by auction, the bill was dismissed merely on account of the inadequate price given for the estate; viz., 120*l.*, and it was worth 2000*l.*; but, on a re-hearing before Lord Eldon, although the decree was affirmed upon a different ground, yet he said he was inclined to say that a sale by auction—there being no fraud, surprise, etc.—cannot be set aside for mere inadequacy of value. It would be very difficult, he said, to sustain sales by auction, if the court would not specifically perform the agreements.

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Consideration uncertain in amount—whether question of inadequacy is thereby excluded.

real value, the allotment to which he might be entitled under an expected inclosure award.(h)

It is laid down by Sir *E. Sugden*; (i)[2] that "if an uncertain consideration (as a life annuity) be given for an estate and the contract be executory, equity, it seems, will enter into the adequacy of the consideration." However, in a case(k) before Sir *J. Wigram*, V. C., his honor, in deciding that an inadequacy of seven or eight *per cent.* was insufficient as a defence, made observations indicating a doubt whether the older cases are to be regarded as authorities; they having been decided before the modern rule of treating inadequacy of price in contracts for the purchase of interests in possession as nothing more than an ingredient in evidence, was perfectly established: at any rate the circumstance of the contingency having turned out unfavorably to the vendor, is no ground of defence.(l)

But although in sales of property in consideration of a life annuity, the court will decree specific performance notwithstanding the death of the annuitant, it will inquire with some jealousy as to the fairness of the transaction,

(h) *Anon.* cited 6 Ves. 24; and see *Knight v. Majoribanks*, 11 Beav. 329, affirmed, 2 Mac. & G. 10.

(i) Sug. 311; citing *Pope v. Roots*, 1 Bro. P. C. 379; *Mortimer v. Capper*, 1 Bro. C. C. 156; and *Jackson v. Lever*, 3 Bro. C. C. 605.

(k) *Bower v. Cooper*, 2 Ha. 408.

(l) *Coles v. Trecothick*, 6 Ves. 246; *Kenney v. Wezham*, 6 Mad. 355.

[2] In the case here referred to, A. contracted with B. for the sale of an estate to him, in consideration of a life annuity; and the completion of the agreement, was delayed by the illness of a mortgagee, who was to have been paid off. Two days after the time mentioned for completing the purchase, A. met with an accident, and died within a few days. By the terms of the contract, the first payment of the annuity, became due, previously to the death of A. but it was not paid or tendered. A bill for a specific performance was dismissed.

Sugden, (1 Sug. on Ven. p. 342, suggests that) "to obviate all difficulty, for the life of the vendor, to expressly declare, that the death of the vendor, previously to the completion of the contract, shall not put an end to it, although a payment of the annuity shall not have become due, or having become due, shall not have been made or tendered; but that, on the contrary, the purchaser shall be entitled to a conveyance on payment of a proportionate part of the annuity, up to the death of the vendor."



require a clear case for specific performance under such Ch. XVIII  
circumstances.(m)

\*We have already considered(n) those cases in which the court has, upon the mere ground of inadequacy of consideration, set aside sales of reversionary interests, even after the conveyance has been executed : these cases, of course, are, *a fortiori*, authorities in favor of a defendant resisting specific performance. A degree of inadequacy which might be insufficient to induce the court to interfere and set aside an executed contract, would, it is conceived, be a valid defence in such suit:(o)[1] especially if the contract has not been acted on or attempted to be enforced until the reversion has fallen into possession.(p)

[\*512]  
inadequacy.  
in sales of  
reversionary  
interests.

We have already seen that where the estate is sold for

Failure of  
contingent

(m) *Per* Lord Cottenham, C., in *Davies v. Cooper*, 5 Myl. & C. 279.

(n) *Supra*, 353, *et seq.*

(o) See Sug. 312, 314; *Ryle v. Swindells*, M'Clel. 519; *Playford v. Playford*, 4 Ha. 546; *Vigers v. Pike*, 8 Cl. & Fin. 645.

(p) *Playford v. Playford*, *ubi supra*.

[1] In this case, a tradesman, for 30*l.* paid at the time of the agreement, and 570*l.* further part of 770*l.* to be paid at the time of the conveyance, sold eight-twelfths of a property in remainder expectant upon his father's death and 200*l.* were to be retained by the purchaser, in order that if he were obliged, upon the purchase of the remaining shares, to give more than 100*l.* a piece, he might reimburse himself the excess, and pay the residue to the seller, and he was to pay interest on the 200*l.* in the meantime. The bill was filed by the purchaser for a specific performance. The witnesses differed as to the value; but the bill was dismissed, as too favorable bargain for the purchaser. The plaintiffs witnesses were farmers and tradesmen, and, in the opinion of the court, they overvalued the father's life interest. It was, the court said, thrown upon the plaintiff to make out a case of adequacy in order to entitle himself to a decree, and he had not done it in the way he ought; it was incumbent on him to have a valuation of the property made by a competent valuator, and an actuary should have stated what was the value of the father's life interest, and what would have been a fair consideration for the reversionary interest, upon a view of all the circumstances. He thought no man capable of dealing prudently for his own interests (and the seller's condition was represented to be that of extreme indigence, ignorance, imbecility of intellect, and habitual inebriety,) could have acceded to the stipulation as to the 200*l.* by which it in fact depended upon the conduct of the vendee of the estate whether he should ever receive more of the residue of the purchase-money or not.

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consideration, in general no defence.

Excess of purchase-money, when a purchaser's defence.

Remarks on the doctrine.

[\*513]

a contingent consideration, *e. g.*, a life annuity, the occurrence of the contingency is, in general, no defence to the purchaser's suit for specific performance.(*q*)

So, on the other had, it has been held that the mere excessive amount of the purchase-money, (even although not attributable to fraud, misrepresentation, or concealment on the part of the vendor,) is a defence available to a purchaser ;(*r*) and Sir *E. Sugden*, remarks that "few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party ; and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, equity will not compel a performance *in specie*."(*s*)[1]

It is, however, submitted, that such a defence by a purchaser deserves but little favor in a Court of Equity : there is a great difference between proofs of inadequacy and of excess of price. Inadequacy can be ascertained by reference \*to an extrinsic standard ; viz., the general market value of similar property ; and there is no difficulty in comparing money with money : but the court when required to pronounce a price excessive, is called upon to do what it has, apparently, no satisfactory means of doing ; viz., to determine what represents the money value, to a specified individual, of a specified estate :

(*q*) *Supra*, 117, *et vide*, 511.

(*r*) *Day v. Newman*, cited 10 Ves. 300.

(*s*) *Sug. 310.*

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[1] In this case, the estate was represented on the one hand, of the value of nine or ten thousand pounds, and on the other of only 5000*l.* The contract was for 6000*l.* ; and 14,000*l.* at the death of a person aged sixty five. The court said it was not a case of actual fraud ; but it was insisted the bargain was grossly inadequate ; and the inadequacy was very great : it was impossible, upon the whole evidence, to make the estate to be worth more than 10,000*l.* : though the court ought not to decree a performance, yet as no advantage was taken of necessity, &c. it was not warranted to decree the vendor to deliver up the contract, the only inconvenience of which would be, that an action would lie for damages ; and both bills were accordingly dismissed. See *Wilson v. Force*, 6 Johns. Rep. 110 ; *Seymour v. Seymour*, 6 John. Ch. Rep. 822 ; *Bugge v. Ellis*, 1 Des. 160.

there is no extrinsic standard by which such value can be certainly determined. The mere fact of the contract having been entered into knowingly and *bona fide*, may, it is conceived, be not unreasonably considered in itself to determine the real value of the estate, to the purchaser, at the time of the contract; whatever may be its value to third persons, and however much its value to the purchaser himself may have been altered by subsequent events.<sup>(t)</sup>

As to the six of the above heads:—comprising those grounds of defence which consist of matters relating to the conduct of the plaintiff subsequent to the contract: these may be conveniently treated of with reference to:—

1st. Cases, where the defence is, that the plaintiff (whether vendor or purchaser, has released, expressly waived, or improperly delayed to enforce his rights under the contract.

6th.—Conduct of plaintiff after contract—when a defence.

Release waiver of, or delay to enforce the contract.

2ndly. Cases, where the defence is, that the plaintiff (being the vendor) has, by his conduct, in respect of the estate, or towards the purchaser, forfeited his rights under the contract.

Conduct of plaintiff.

3rdly. Cases, where the defence is, that the plaintiff (whether vendor or purchaser) has already chosen his remedy and obtained satisfaction for the alleged breach of contract.

Election of other remedy for breach of contract.

\*As to the first class of cases.—An actual release by deed, or a mere written waiver of the contract, will, of course be a good defence in equity: so will a mere parol waiver; “but such a defence must be established with the greatest clearness and precision; and the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into:”(u) and Sir *E. Sugden* remarks, that

[\*514]

Release, waiver of, or delay to enforce the contract.

(t) And *qu.* as to the hardship of the bargain being a defence, whether the court should ever, merely on that ground, decline to enforce specific performance, if the circumstances, which are relied on as constituting the hardship, may be supposed to have been present to the mind of the defendant at the time of his entering into the contract?

(u) *Per* Lord Lyndhurst in *Robinson v. Page*, 3 Russ. 114, 119; and see *Price v. Dyer*, 17 Ves. 364.

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"the court will look at the evidence with great jealousy:"(w) and has held, judicially, that there must be as clear evidence of the waiver as of the existence of a contract.(x)[1]

What delay  
in filing bill,  
a defence.

We have already considered,(y) how far time is in equity of the essence of the contract: even, however, where a clear right has existed to enforce the contract such right may be lost by delay in resorting to the court; e. g., an unexplained delay of seven years,(z) and, in another case, of four years and eight months,(a) in filing the bill, has in itself been considered a sufficient answer to the suit: where the bill was filed within fourteen months after a correspondence upon objections to the title had ceased, by the defendants returning no answer to the last letter which called for a distinct answer and threatened to file a bill, specific performance was decreed; the court observing, that one could easily imagine that circumstances might have happened which would have made it peevish to file the bill immediately.(b)[2] Less time,

(w) Sug. 173.

(x) *Carolan v. Brabazon*, 3 J. & L. 200; as to the alteration of an agreement by either party, *vide supra*, p. 108.

(y) *Supra*, Ch. X., and as to a mere option of purchase, *vide supra*, 98, n. (q.)

(z) *Milward v. Earl of Thanet*, 5 Ves. 720, n.

(a) *Alley v. Deschamps*, 13 Ves. 225.

(b) *Marquis of Hertford v. Boore*, 5 Ves. 719.

[1] See 6 Mass. Rep. 24; 9 Pick. 105; 4 Conn. 550; 4 N. H. Rep. 191; 1 N. H. Rep. 9; 7 Wend. 136; 2 Hall 171; 8 John. Rep. 392; 3 *ib.* 590; 8 Mass. Rep. 146; 11 Wend. 30; 3 John. Rep. 528; 14 *ib.* 330; 7 Cowen 48; *Jackson v. Vosburgh*, 7 John. Rep. 186; 10 John. 336, 358; 6 *ib.* 21; 12 Wend. 408; 2 *ib.* 590; 3 John. Rep. 528; *Avery v. Kellog*, 11 Cowen, Rep. 563; *Delacroix v. Bulkley*, 13 Wend. 71; 4 Conn. Rep. 550; *Stevens v. Cooper*, 1 John. Ch. Rep. 429, 430; *Botsford v. Burr*, 2 John. Ch. Rep. 405; *Rowan v. Lytle*, 11 Wend. 616.

[2] In this case, upon objections to title, the treaty had proceeded for about two years, when the vendor's solicitor wrote, calling for a distinct answer, saying that otherwise, he must be under the necessity of filing a bill. No answer was returned to the letter, nor was any notice given that the purchaser considered the contract as abandoned; neither had he brought any action for the deposit. The bill was filed after a delay of about fourteen months, and the defendant resisted a specific performance on the ground of delay, by which he stated he had suffered material in-

however, will in general be allowed when the defendant Ch XVIII. has expressly \*refused, than when he merely tacitly neglects, to perform the agreement: in cases of the former description, periods of delay, varying from two years and a half(c) to twelve months,(d) have been held sufficient to bar the relief:(e) it does not, however, appear, that time will run against the plaintiff so long as the question of completion remains under discussion;(f) or while he is substantially in possession of the benefit contracted for;(g) the modern tendency of the court has been to require the plaintiff to be prompt in seeking his equitable remedy.(h)[1]

(c) *Stewart v. Smith*, 6 Ha. 222, note.

(d) *Watson v. Reid*, 1 Russ. & M. 236.

(e) See *Heaphy v. Hill*, 2 Sim. & St. 29, about two years' delay; *Walker v. Jeffreys*, 1 Ha. 341, two years; *Southcomb v. Bishop of Exeter*, 6 Ha. 213, nineteen months.

(f) See *Southcomb v. Bishop of Exeter*, 6 Ha. 213; and *Mozhay v. Inderwicke*, 11 Jur. 837, where a correspondence upon the shape of the conveyance was carried on at considerable intervals for nearly four years; and see *Gee v. Pearse*, 2 De G. & S. 325.

(g) *Clarke v. Moore*, 1 J. L. 723; but delay will be material on the question of costs; see *Burke v. Smyth*, 3 J. & L. 193.

(h) *Southcomb v. Bishop of Exeter*, 6 Ha. 213.

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convenience, having purchased the place as his residence, and that he was induced to consider the contract as abandoned. A specific performance was however decreed.

[1] On this subject, Mr. Story, (2 Story's Juris. sec 776,) says: "One of the most frequent occasions, on which courts of equity are asked to decree a specific performance of contracts, is, where the terms for the performance and completion of the contract, have not, in point of time, been strictly complied with. Time is not generally deemed in equity to be of the essence of the contract, unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract. It is true, that courts of equity have regard to time, so far as respects the good faith and diligence of the parties. But if circumstances of a reasonable nature, have disabled the party from a strict compliance, or if he comes *racenti facto*, to ask for specific performance, the suit is treated with indulgence, and generally with favor by the court. But then, in such cases, it should be clear that the remedies are mutual; that there has been no change of circumstances, affecting the character or justice of the contract; that compensation for the delay, can be fully and beneficially given; that he who asks a specific performance, is in a condition to perform his own part of the contract; and that he has shown himself ready, prompt, desirous, and eager to perform the contract. Even

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Waste of estate, when a defence;

As to the second class of cases.—We have already seen that any act by the vendor—*e. g.* the fall of ornamental timber—which prevents his giving to the purchaser that

where time is of the essence of the contract, it may be waived by proceeding in the purchase after the time has elapsed; and if time was not originally made by the parties, of the essence of the contract, yet it may become so, by notice, if the other party is afterwards guilty of improper delays in completing the purchase." The plaintiff, on the 28th of March 1810, agreed to purchase of the defendant, a piece of ground, and pay in two, three, and four years, with interest annually; and upon complying with the payments, the defendant agreed to give a deed. If the plaintiff failed in them, or any of them, the agreement was to be void. He entered and made improvements; but omitted to make the payments until 1814, when he tendered all the money due on the contract, which the plaintiff refused to accept. The plaintiff had often declared his inability to pay, and disclaimed any right to the premises, and relied on the defendants' liberality, for the occupation of them. In 1812 the defendant notified him to quit the premises; and the plaintiff then agreed, that if he would permit him to remain one year, and occupy, he would clear and fence, five acres of the land; to which, the defendant assented. In October, 1813, when a purchaser applied to the defendant, the plaintiff acquiesced in the sale, and declared he should abandon, whether sold or not. Held that there was an abandonment of the purchase, and there was no color of equity in the plaintiff. The court remarked, that it was an acknowledged rule in courts of equity, that where the party applying for a specific performance, has omitted to execute his part of the contract, by the time appointed for that purpose, without a sufficient reason to justify or excuse his delay—and where there was nothing in the acts or conduct of the other party that amounted to an acquiescence in that delay, the court would not compel a specific performance. This rule is founded in the soundest principles of policy and justice. Its tendency is to uphold good faith and punctuality in dealing. The notion that seems too much to prevail that a party may be utterly regardless of his stipulated payments, and that a court of chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and the character of the court. The court adds; "From the view which I have taken of the cases, the general principle appears to me, to be perfectly established, that time is a circumstance of decisive importance in these contracts; but it may be waived, by the conduct of the party; and it is incumbent upon the party calling for specific performance, to show that he has used due diligence, or if not, that his diligence arose from some just cause, or has been acquiesced in; that it is not necessary for the party resisting the performance, to show any particular injury or inconvenience; it is sufficient, if he has not acquiesced in the negligence of the plaintiff, but considered it as releasing him." *Benedict v. Lynch*, 3 John. Ch. Rep. 379; See *Gibbs v. Champion*, 3 Ham. Rep. 335; *Brasher v. Gratz*, 6 Wheat. 528; *Pratt v. Carrol*, 8 Cranch, 471; *Avery v. Kellogg*, 11 Conn. Rep. 562.

which was substantially the subject-matter of the contract, Ch. XVIII. will be a defence to his suit for specific performance ;(i) but that he may, in due course of husbandry, cut coppice, and get in crops, accounting to the purchaser for the net profits.(k)

So, the circumstance of the vendor having turned the purchaser out of possession, (which he was entitled to under the contract, and had been allowed to take,) has been held a sufficient defence to the vendor's suit.(l)

So, if the plaintiff refuse or be unable to perform a material stipulation under the contract—as if it had been \*agreed that the vendor should become tenant of the estate for a term of fourteen years at a specified rent, and he become insolvent(m)—this may be a reason for refusing specific performance against the purchaser ; but this defence was overruled when the agreement was for merely a yearly tenancy, and especially as the vendor's embarrassments were known to the purchaser.(n)

As to the third class of cases.—If the plaintiff has brought an action at law and has recovered damages for breach of contract he will be held to have elected his remedy.(o)

(10.) *As to the proceedings in the suit ;—viz. payment of purchase-money into Court ;—reference of title and proceedings thereon—decree for plaintiff—conveyance—decree dismissing Bill.*

Where the purchaser is in possession of the estate, he may, even before answer,(p) be ordered upon motion to pay the purchase-money into court ; this relief it seems will be afforded, when “ the possession by the purchaser, without payment of the purchase-money, is according to

(i) *Supra*, 116.

(k) *Ibid.*

(l) *Knatchbull v. Grueber*, 3 Mer. see 144.

(m) See 1 Y. & C. Exch. 228.

(n) *Lord v. Stephens*, 1 Y. & C. Exch. 222, 228 ; *sed qu.* whether the length of the tenancy is material ; see Sug. 338.

(o) See *Sainter v. Ferguson*, 1 Mac. & G. 286.

(p) *Dixon v. Astley*, 1 Mer. 133 ; *Blackburn v. Stace*, 6 Mad. 69.

or ejectment  
of purchaser  
rightfully in  
possession.

Or inability  
of vendor to  
perform a  
material sti-  
pulation un-  
der the con-  
tract.

[\*516]

Action  
brought and  
damages re-  
covered.

Purchaser in  
possession,  
when order-  
ed to pay  
purchase-  
money into  
Court.

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the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example cutting timber, or selling the estate,"(q) or dealing with it in a manner contrary to former usage, or to the usual course of husbandry;(r) "but not," according to Sir *E. Sugden*, "where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate;"(s)[1]

(q) Sug. 251; Dan. Ch. Prac. by H. 1642.

(r) *Osborne v. Harvey*, 1 Y. & C. C. C. 116.

(s) Sug. 251.

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[1] Sugden (1 Sug. on Vend. p. 261, 262) thus states the rule in practice, of calling upon the purchaser of estates, to pay their purchase-money into court: "A new practice has sprung up, by which certainly, some suits, have been quickly disposed of, but which has been a great surprise upon many parties. I allude to the practice of ordering a purchaser, *in possession of the estate*, upon motion, to pay the purchase-money into court. This, under special circumstances, has even been done before answer, but the purchaser has in some cases had the option to pay the money, or give up possession; in others, occupation rent has been set deducting interest on the deposit, and in others, a receiver has been appointed; and payment of the money will be ordered, although, by the agreement, it is payable by instalments, and a portion of it is to remain secured upon the estate. This rule has been adopted where the possession has been given under a mutual apprehension that the title could be immediately made good—where the purchaser had a sort of mixed possession with the vendor, and had paid part of the purchase-money, was insolvent, and had attempted, without effect, to sell the estate—where the purchaser approved of the title and prepared a conveyance, and then raised objections—where the purchaser had been guilty of laches and cut underwood; even in a case where it appeared, on the face of the abstract, that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser. So where, from circumstances, an acceptance of the title was inferred. Again where a time was fixed for payment of the purchase-money, by instalments, and the property was a *coal mine*. In all these cases, the rule has been applied, and if the estate be sold under a *decree*, the purchaser, if he enters into possession, will be compelled to pay his purchase-money into court unless he entered with the express consent of the court. But where the sale is not by the court, and the seller has thought proper to put the purchaser into possession, with an understanding between them that he shall not pay his money until he has a title, the purchaser cannot be called upon to pay the money into court, in this summary way; nor can the payment be compelled, where the vendor gives possession without stipulation, or the purchaser was in possession, under another title before the contract; or the possession was given independently of the contract, and the seller has been guilty of laches; although, in such cases, the pur-



this last \*proposition must, however, be taken subject to the following qualifications, viz., that where a purchaser has been *long* in possession, *e. g.* three years, <sup>(t)</sup> he will be required either to give up <sup>(u)</sup> possession or to pay in his purchase-money within a short date, *e. g.* two months; <sup>(w)</sup> and this was ordered in a case where, according to the agreement, the greater part of the purchase-money was to remain on mortgage of the estate for twelve months after the conveyance: <sup>(x)</sup> a similar order was made, in a modern case, by Lord *Langdale*, although the purchaser had taken possession for the benefit of the vendor, and expressly without prejudice to any objection he might afterwards make to the title, and had retained pos-

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Purchaser  
allowed to  
elect,—either  
to pay or va-  
cate posses-  
sion.

(t) *Tindal v. Cobham*, 2 Myl. & K. 385; *Younge v. Duncombe*, You. 275.

(u) Where possession having been taken by an agent in mistake, had been restored, the motion for payment was refused; *Tomlinson v. Manchester and Birmingham Railway Company*, 2 Rail. Ca. 104.

(w) *Younge v. Duncombe*, You. 275.

(x) *S. C.*, *sed qu.* whether the purchaser, if the point had been pressed on the court, would not have been allowed to give his bond or covenant for the amount agreed to be left on mortgage; and see the judgment in *Clarke v. Elliott*, 1 Mad. 606, 607.

chaser may make himself liable to the demand by dealing improperly with the estate, *e. g.* cutting trees, or selling it to another person. But the purchaser after a long period, will not be permitted to keep possession of the estate, and also withhold the purchase-money: if a title has not been made, he will be put to his election, within a reasonable time, *e. g.* two months, to give up the possession, or pay the purchase-money. If an agreement be by parol, for sale, at so much per acre, and possession be given to the purchaser, without any understanding respecting the period when the purchase-money should be paid, and the bill alleges a quantity of land to be sold, which is denied by the answer, and the bill only seeks a performance as to the larger quantity, no money will be ordered into court." He then proceeds to deduce two simple rules from the cases: 1st. Where the possession is taken under the contract, or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course. But 2d. If the possession by the purchaser without payment of the money, is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example, cutting timber, by which the property is lessened in value, or selling the estate, by which the first seller's remedy is complicated without his assent, in such cases, the court will interpose and compel the purchaser to pay the purchase-money into court.

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session for about a year and a half: and although the above proposition of Sir *E. Sugden* was cited in argument, his Lordship seemed to consider that, as a general rule, a purchaser could not be allowed to retain both the estate and the money.(y)

Quantity of land taken when uncertain, no order made.

In a case where, according to the bill, there was a parol agreement for sale at 80*l.* per acre, with possession given of five acres, but, according to the answer, only of three acres, a motion that the purchaser should pay in the purchase-money for the five acres, or else for the three acres, was refused.(z)

Under special circumstances, receiver appointed

[\*518]

In a case where there was a sort of mixed possession, the greater proportion of it being in the purchaser, but \*the vendor not being entirely out of possession, and part of the purchase-money was paid, but the purchaser was in a state of insolvency and admitted his intention to convey the estate to trustees for the benefit of his creditors, the court appointed a receiver.(a)

Or occupation rent set on estate.

In another case an occupation rent was set on the estate deducting interest at 5*l.* per cent. on the deposit:(b) so where a yearly tenant in possession filed a bill claiming an option to purchase, the court would only restrain an ejectment by the landlord on the terms of the tenant continuing to pay the rent, without prejudice.(c)

Vendor plaintiff seeking injunction, when obliged to pay in deposit.

Where a vendor in possession files a bill for specific performance and to restrain the purchaser from proceeding at law for his deposit, he can generally obtain the injunction only on the terms of paying the deposit into court; unless his retention of the estate be the fault only of the purchaser; as where the vendor is able and willing to make a good title and the other improperly refuses to complete.(d)

Injunction against

A purchaser in possession, even under the contract, but

(y) *Fowler v. Ward*, 6 Jur. 547; and see *Adams v. Heathcote*, 10 Jur. 301, V. C. E.; *Smith v. Lloyd*, 1 Mad. 83; and *Wickham v. Evered*, 4 Mad. 53.

(z) *Benson v. Glastonbury Canal Company*, 1 C. P. Coop. N. R. 350.

(a) *Hall v. Jenkinson*, 2 Ves. & B. 125; see the judgment, 126.

(b) *Smith v. Jackson and Lloyd*, 1 Mad. 618.

(c) *Pyke v. Northwood*, 1 Beav. 52.

(d) *Wynne v. Griffith*, 1 Sim. & St. 147, 149.

who has not paid his purchase-money, may be restrained on motion from waste or destruction of the property ; *e. g.* : from felling timber : (e) [1] so, the vendor may, under special circumstances, as where he has given up possession and received part of the purchase-money, (f) be restrained from conveying away the legal estate, or contracting to resell the property : (g) but, in general, in a suit for specific performance the purchaser is not entitled to restrain the owner from dealing with his property ; as a \*different doctrine would operate to control the rights of ownership ; although the agreement were such as could not be performed : (h) but in a suit to enforce an agreement for sale of a next presentation, the vendor may be restrained from presenting any clerk not nominated by the purchaser ; and the injunction has even been extended so as to restrain the Bishop from presenting, except on the like nomination, or from collating in the event of a lapse pending the suit. (i)

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waste by purchaser in possession.

Against exercise by vendor of his legal rights.

[\*519]

Where the question of title is the only one in dispute, the court, in order to save time, (k) will, at the instance of either party, direct a reference to the master upon motion

Reference of title, on motion before hearing.

(e) *Crockford v. Alexander*, 15 Ves. 138 ; *vide supra*, p. 118, 119.

(f) *Spiller v. Spiller*, 3 Sw. 556.

(g) *Echlin v. Baldwin*, 16 Ves. 257 ; *Curtis v. Marquis of Buckingham*, 3 Ves. & B. 168.

(h) *Per* Lord Eldon in *Spiller v. Spiller*, *ubi supra* ; *Turner v. Wight*, 4 Beav. 40 ; see *Haigh v. Jaggan*, 2 Coll. 231.

(i) *Nicholson v. Knapp*, 9 Sim. 326.

(k) *Dorin v. Harvey*, 9 Jur. 648 ; 15 Sim. 49.

[1] An injunction will lie to restrain the defendant from cutting timber and committing other waste, he being in possession, claiming title adversely, a suit being in progress at law, to try the title. *Shubrick v. Guerard*, 2 Des. 616 ; *Storm v. Mann*, 4 Johns. Ch. Rep. 21, *contra*. An injunction will lie against a mortgagor in possession, to stay waste ; although no suit be pending for foreclosure. *Brady v. Waldron*, 2 Johns. Ch. Rep. 148. An injunction to stay waste, will not be granted against a vendee, to whom land has been sold in fee, even where the vendor retains the title as security for the purchase-money ; unless he brings his suit to enforce the lien, alleging that the defendant is committing waste in such a manner as to render the land an incompetent security ; in which case, an injunction to stay waste, *pending the suit*, may be awarded. *Scott v. Wharton*, 2 Hen. & Munf. 25.

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Unless contract resisted on grounds other than of title.

before the hearing, or even, at the instance of the plaintiff, (l) before answer; (m) unless the defendant's counsel can state that other matters are in question; (n) and this, although the only question of title is one which might be conveniently determined at the hearing without a reference, (o) or although specific performance be resisted upon the ground that time was of the essence of the contract, and that a good title was not shown within the specified period; (p) such an order, if obtained by the plaintiff before answer, will not preclude the defendant from making any defence which he thinks proper; (q) and in a suit commenced by claim under the new orders of April, 1850, the order of reference is of course, unless sufficient cause to the contrary is shown by the defendant on the hearing of the claim. (r) [1]

[\*520]

Frivolous defence.

"It is said by Sir E. Sugden, that "in every case, where the answer, upon reasons solid or frivolous, insists that the agreement ought not to be executed, the court must first dispose of the question raised;" (s) and according to some authorities, such question could only be dis-

(l) See *Curling v. Flight*, 5 Ha. 247.

(m) *Balmano v. Lumley*, 1 Ves. & B. 224; *Bennett v. Rees*, 1 Keen, 408.

(n) *Matthews v. Dana*, 3 Mad. 470.

(o) *Curling v. Flight*, 5 Ha. 248.

(p) *Foxlove v. Amcoats*, 3 Beav. 496.

(q) *Emery v. Pickering*, 13 Sim. 583.

(r) But the agreement must be admitted by the defendant, or proved by the plaintiff, *supra*; and see *Marshall v. Davies*, 14 Jur. 997, V. C. R.

(s) Sug. 416; and see cases there cited.

[1] In all cases where a bill in equity is filed for a specific performance, either party may, in general, if he please, have reference as to the title. The vendor is entitled to this privilege in order to enable him to make out a title. The purchaser is allowed this right, in order that he may have the title assured in a manner he otherwise could not. As to a purchaser, the court never acts upon the fact that a satisfactory abstract was delivered, unless the party has clearly bound himself to accept the title upon the abstract; but though the abstract is in the hands of the party who says he cannot object to it, yet he may insist upon a reference, because, by the production of papers which can be enforced, and by the examinations and inquiries which can be made, the title may be examined in a manner it never could, upon a mere abstract. Either party may, however, waive this right. See 2 Sug. on Vend. p. 18.

posed of upon the hearing.(t) However, in a recent case, Ch. XVIII. where the question arose whether a defence, even although May be disposed of on motion—semble. frivolous, is necessarily an answer to the motion, Sir J. Wigram, V. C., observed, that such has not been the practice, at least since the case of *Withy v. Cottle*.(u) Since the decision in that case, the practice of the court has been to look into the answer for the purpose of seeing whether that which the defendant calls an objection to performing the contract is an open question. A point raised by the answer as an objection other than to title, may be so surrounded and governed by authority, as, in fact, to create no difficulty, and to be, in effect frivolous; and in that case the court does not yield to the objection by refusing the reference.(w)

It has been decided by the same learned judge, that for the purpose of such a motion, objections to the title mean such objections as can only be properly the subject of adjudication upon the investigation of the title: *e. g.*, objections depending on the application of conditions of sale, (the propriety or validity of the conditions themselves not being questioned;)(x) or on the liability of the vendor to furnish any particular evidence of title, or on his ability to furnish such evidence.(y) Objections to title, what are, for purpose of motion.

\*And since the object of granting the reference before the hearing is merely to save time, the court has refused such a motion by a plaintiff-vendor, who, for eleven months after answer, had taken no proceedings in the suit.(z) [\*521] Order refused on ground of delay;

And, of course, no reference will be directed even at the hearing, if the court be satisfied that the purchaser has intentionally waived his right to investigate the or waiver of title;

(t) *Sée Blyth v. Elmhirst*, 1 Ves. & B. 1; *Wilky v. Cottle*, 1 Sim. & St. 174; *Gordon v. Ball*, 1 Sim. & St. 178.

(u) *Turn. & Russ.* 78.

(w) *Wood v. Machu*, 5 Ha., see p. 161; and see *Boyes v. Liddell*, 1 Y. & C. C. 133.

(x) *Wood v. Machu*, 5 Ha. 158.

(y) *Curling v. Flight*, 5 Ha. 248.

(z) *Dorin v. Harvey*, 9 Jur. 648; 15 Sim. 49.

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title;(a)[1]—and it has been refused on the mere ground of long possession and vexatious objections on the part of the purchaser.(b)

conditional  
acceptance  
of title—  
effect of.

We have already seen that a purchaser who accepts a title, conditionally on the vendor complying with a specified requisition, which is not complied with, is entitled to a general reference of title.(c)[2]

(a) *Fleetwood v. Green*, 15 Ves. 594; *Margravine of Anspach v. Noel*, 1 Madd. 310; *Burroughs v. Oakley*, 3 Sw. see p. 168, and earlier cases cited in argument; *Blacklow v. Laws*, 2 Ha., see p. 47.

(b) *Hall v. Laver*, 3 Y. & C. 191.

(c) *Supra*, p. 217; *Lesturgeon v. Martin*, 3 Myl. & K. 255.

[1] In the first of the cases here cited, the purchaser, by the contract, was to be let into immediate possession, and was to pay interest for a year, when the purchase money was to be paid, on having a good title. And possession was given accordingly, and an abstract delivered, to which no objection was made, but the purchaser had delayed to complete the purchase for upwards of three years after the day named, and had not paid all the interest due, the court compelled him to accept the title without any investigation. In the second of these cases possession was given under the contract, and the abstract was delivered, and the purchaser allowed more than two years to elapse before he took any objection to the title, which was about one year and a half after the time when the contract should have been completed, and in the mean time had made alterations in the houses and let them, and written several letters, apologizing for not having paid the purchase money, he was decreed, by his conduct, to have accepted the title. The alterations of the premises, and the letting them, were considered acts strongly indicating an acceptance of the title, for till the title was accepted the purchaser was not bound to pay the money. In a still later case, the purchaser, by his answer, swore that he did not mean to waive his objections to the title, but the court said that if a party acts in a manner from which it may be implied he does not mean to object to the title, he cannot afterwards, at a distance of time, when evidence perhaps, is lost, insist upon objections to the title.

[2] Under such reference it has been held, that if the purchaser can show a good title at any time before the master's report, it will entitle him to a decree; and even after the report, if the vendor can satisfy the court that he can make a good title, by clearing up the objections reported by the master, the court will make a decree in his favor.

The question whether a vendor was or was not able, to make a good title, at the time of the reference to the master is a very material one with reference to costs, though not, with reference to the decree for a specific performance, the rule of the court being, that a vendor is not entitled to costs, except from the time when his title is reported complete; and that up to that time, he must pay costs himself.

It is to be recollected that it is a fundamental principle of courts of

The reference, when directed, should be complete and extend to all that regards the title, but not to other matters; (d) the order is, to inquire whether the vendor can, at the time of the reference (not at the date of the contract) show a good title; (e) and it should contain a direction that if the master shall find that a good title can be shown, he shall inquire when it was first shown; and so the order is now always made; unless, for some reason stated at the time, and by the express direction of the court, the inquiry as to the time when a good title was first shown, be omitted; (f) so, also, an inquiry will, if desired, be directed, whether the defendant ever, and when required of the plaintiff, any and what evidence in "proof of a point material to the title; (g) but not as to a matter which has no reference to the title: *e. g.*, the sufficiency of the abstract delivered. (h) The order should also contain the usual directions for the production of deeds, &c., and for the examination of the parties on oath, and reserve further directions and costs. (i) [1]

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Order of  
reference,  
subject-  
matter and  
form of.

[\*522]

The form of the order of reference in a suit commenced by claim under the orders of April, 1850, is as follows, (k) [2]

Form of, in  
suit com-  
menced by  
claim.

(d) *Jennings v. Hopton*, 1 Madd. 212; *Bennett v. Rees*, 1 Keen, 405.

(e) *Langford v. Pitt*, 2 P. Wms. see 630; Dan. Ch. Prac. by H., 982.

(f) Per Lord Langdale in *Bennett v. Rees*, 1 Keen, 409.

(g) *Ibid.* 408.

(h) *Ibid.*

(i) *Winterbottom v. Ingham*, 9 Sim. 664.

(k) See Schedule C. No. 10.

equity, to make as complete a decision upon all the points embraced in a cause, as the nature of the case will admit, so as to preclude, not only all further litigation between the same parties, but the possibility of the same parties being, at any future period, disturbed, or harassed, by other parties claiming the same matter, as well as of any danger that may exist of injustice being done to other parties who are not before the court in the present proceedings.

[1] See 2 Barb. Ch. Pr. 296; 1 ib. 328.

[2] The following form may be adopted:—

[Title of Cause.]

On reading and filing the pleadings in this cause, affidavits &c. and on hearing Mr. N. of counsel for the defendant, in support of this motion, and Mr. P. of counsel for the complainant, in opposition thereto, it is ordered, that it be referred to one of the masters of this court, residing

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viz., "that it be referred to the master of this court in rotation to inquire whether a good title can be made to the property comprized in the agreement in the plaintiff's claim mentioned; and in case the said master shall be of opinion that a good title can be made, it is ordered, that he do state at what time it was first shown that such good title could be made;" and reserves further directions and costs; and under the 17th order the master has a general authority to cause the parties to be examined upon interrogatories and to produce deeds, books, papers and writings, as he shall think fit.

Pending the reference, the defendant cannot, under the 114th order of May, 1845, dismiss the bill for want of prosecution.<sup>(l)</sup>

Proceedings  
on refer-  
ence;  
Master pro-  
ceeds on  
abstract;

No state of facts is carried in, but the master proceeds upon the abstract; and he will assume its correctness and not require the production of the title deeds, unless their production is insisted on by the purchaser;<sup>(m)</sup> on "litigated questions of title, written objections are brought in by the party objecting; and the master is either attended by counsel on both sides, or the written opinions of counsel upon the abstract already given are produced to him,

(l) *Collins v. Greaves*, 5 Ha. 596.

(m) See Danl. Ch. Pr. by H. 1168.

in the county of \_\_\_\_\_ to inquire whether a good title can be made to the premises comprized in the agreement between the parties to this cause, mentioned in the pleadings therein, and that he state his opinion thereon, to the court. And in case he shall be of opinion that a good title can be made, it is ordered that he do inquire and state when it was first shown that a good title could be made. And that the said master do inquire and report, as to the quantity of land agreed to be conveyed, by the complainant, and that he take an account of the payments made upon such agreement, by the defendant, and that he ascertain and report, the balance now due from him upon the said agreement. And for better discovery of the matters aforesaid, the parties are to produce, before the said master, upon oath, all deeds, books, papers, and writings, in their custody or power, relating thereto, and are to be examined upon interrogatories, as the said master shall direct. And this court doth reserve the consideration of all further directions, and of the costs of this suit, until after the said master shall have made his report. And either of the parties are to be at liberty to apply to the court, as occasion shall require. See 2 Barb. Ch. Pr. 452.



according to circumstances;(n) and he has the same power to examine witnesses on a reference upon motion, as he would have if it were under a decree.(o) Ch. XVIII.

The usual and recognized(p) practice, is, for the master, instead of personally perusing the abstract, to submit it to a conveyancing counsel, of his own selection: but although he may avail himself of the assistance afforded him by the opinion thus obtained, he ought not, in his report, to state it as the foundation of his finding.(q) usually takes counsel's opinion thereon:

"In the prosecution of the order for, reference the master, in his discretion, may examine the parties upon interrogatories, and receive evidence upon affidavit, or by the examination of witnesses before him either by written interrogatories or *viva voce*. He may also call for such deeds and other muniments as are necessary to the elucidation of the title."(r) what evidence he may receive and require.

A purchaser will not be compelled take a doubtful title;(s)[1] or a merely equitable title,(t) unless the sale be under a decree of the court,(u) although he may have consented to go before the master upon a reference as to the title to the estate directed in an administration suit;(w) nor will he be compelled to take an equitable title which his vendor, who purchased from the court, was himself obliged to accept;(x) nor will a case be sent for the Purchaser need not accept doubtful or merely equitable title; or consent to a case

(n) *Ibid.*

(o) *Woodruffe v. Titterton*, 8 Sim. 238.

(p) See *Flower v. Walker*, 1 Russ. 408.

(q) *In re Collard*, 10 Beav. 334.

(r) Danl. Ch. Prac. by H. 1169; and see *Winterbottom v. Ingham*, 9 Sim. 654; and 17th Order of April, 1850, *supra*, p. 522.

(s) Sug. 506; *Blosse v. Lord Clanmorris*, 3 Blyth, 62; and other cases cited: see the argument of defendant's counsel in *Howarth v. Smith*, 6 Sim. 161.

(t) *Ibid.* and *Law v. Urwin*, 1 Sim. 377.

(u) *Infra*.

(w) *Cann v. Cann*, 1 Sim. & St. 284.

(x) *Lord Wallham's case*, Sug. 52.

[1] To enable equity to enforce a specific performance, against a purchaser, the title to the estate ought to be free even from suspicion. For it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him.

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being sent  
to Law :

[\*524]

doubt must  
be a reason-  
able doubt.Questions  
of Law  
more readily  
decided  
against pur-  
chaser than  
questions of  
construc-  
tion

opinion of a court of law without his consent ;(y) and if, upon the return of a certificate in favor of the title, the court has any doubt upon the point, a case will be directed to another court of law,(z) and notwithstanding such certificate, the court of chancery will entertain and act upon any equitable objection to the title.(a)

The doubt, whether upon law or fact, must, in order to be a ground for rejecting the title, be a reasonable doubt : according to Lord Hardwicke, "the court, in carrying agreements into execution, must govern itself by a moral certainty, for it is impossible in the nature of things that there should be a mathematical certainty of a good title ; there are often suggestions of old entails, and often doubts what issue persons have left, whether more or fewer, and yet these were never allowed to be objections of that force as to overturn a title to an estate :"(b)[1] and the above remarks are cited with approbation by Sir W. Grant,(c) and Sir E. Sugden :(d) however, in a case before Mr. Baron Alderson, upon the above dicta as to moral and mathematical certainties being cited, the court observed, "that only means that you cannot prove a title by means of reasoning, but only with the help of evidence ; those sort of apothegms get a great deal more reputation than they deserve."(e)

As to doubts depending on a point of law, Sir E. Sugden suggests, that a judge "may feel himself more at liberty to decide a general point of law between vendor and purchaser than a question of construction of an informal instrument, which can afford no precedent, and upon which men may naturally differ :(f) and even an

(y) *Roake v. Kidd*, 5 Ves. 647.

(z) Sug. 506 ; Dan. Chan. Prac. by H. 1088 ; it appears that in the first instance the plaintiff selects the Court ; *Wallon v. Holt*, 13 Jur. 355.

(a) *Sheffield v. Lord Mulgrave*, 2 Ves. jun. 526.

(b) *Lyddal v. Weston*, 2 Atk. 20.

(c) *Hillary v. Waller*, 12 Ves. 252.

(d) Sug. 518.

(e) *Hutchinson v. Morritt*, 3 Y & C. 554.

(f) Sug. 508.

[1] See *Ten Broeck v. Livingston*, 1 John. Ch. Rep. 357.

abstract point of law, will not, if considered doubtful, be decided against a purchaser even by the House of Lords: (g)[1] and where the \*purchaser objects to the title upon the authority of a decision of a court of law in a similar case, the court of chancery, although entertaining a strong opinion against the correctness of such decision, will not overrule it, but will direct a case. (gg)

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[\*525]

If there be an appeal, the fact of the title having been held bad in the courts below will not be a reason for the judge of the appellate court considering the title too doubtful to force on a purchaser, if he himself entertain a clear opinion in its favor; (h) and Lord Eldon, where a purchaser persisted in an objection, which, although doubtful on the previous authorities, had been decided in favor of the same vendor by a recent judgment of his lordship, from which there had been no appeal, decreed specific performance *with costs*. (i)

Decision of Court below, if reversed on appeal, does not render title doubtful.

As to doubts respecting facts, we may here refer to the observations already made (k) as to presumptions of facts as between vendor and purchaser.

As to doubts respecting facts.

In a case where it appeared that upon a previous purchase a tenant for life had, after the contract, exercised a power of appointment in favor of one of his sons, and that

Title not considered doubtful on mere suspicion of fraud.

(g) *Blosse v. Lord Clanmorris*, 3 Bli. 62, 71.

(gg) *Peppercorn v. Peacock*, 4 Jur. 1122.

(h) See Sug. 512.

(i) *Biscoe v. Wilks*, 3 Mer. 456.

(k) *Supra*, 166, *et seq.*

[1] In this case, upon appeal to the House of Lords, the question was, whether a reversion vested in the crown by forfeiture, could be barred by a recovery. Lord Eldon said that the law on this point, was not clearly settled, and that he could not advise the house, sitting as a court of equity in appeal, to hold a purchaser to the contract in a case where it could not be stated as a matter free from doubt, whether the reversion had been barred by the recovery; and as the purchaser had been brought into court upon a doubtful title, he ought to be discharged with costs. Lord Redesdale added, that general opinion, was against the title, but that, in that case, it was not necessary to come to any precise decision on the point. It was sufficient on the question then before the House, if the law were doubtful. A purchaser had a right to require a marketable title, and this title, it must be admitted, rested on a point of law, which, at least, was doubtful.

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Pendency of  
adverse suit,  
no ground  
for reporting  
against  
title.

the father, mother and son had thereupon conveyed to the purchaser, the money being expressed to be paid to the three conveying parties, Lord Eldon held that the mere possibility of the appointment having been founded on a corrupt agreement between the father and son was not a valid objection to the title. (l)[1]

[\*526]

Even the mere fact that a suit is pending, in which part of the lands are claimed adversely to the vendor, is not, in itself, an absolute objection to the title; and in such a case, the master should state the point in question in the \*adverse suit, and his opinion thereon. (m) The court, however, it is conceived, would not, unless the point were perfectly clear, or, perhaps, in any case, compel the purchaser to complete until the adverse claim had been decided on. In a case before Lord Langdale, where the intended purchaser had received notice of a claim to the estate, founded on the alleged invalidity of an appointment, which claim, however, had not been followed up by any act, and no fact had been stated as a foundation for it, his lordship decided that the purchaser was bound to complete; but added, "if it were possible to institute any inquiry as to the facts which took place I think it ought to be done, for the satisfaction of the purchaser; but I do not see, how that can be :"(n) in a late case, where the vendor claimed under a suspicious will, and the heir had failed in an action of ejectment and in a subsequent motion for a new trial, Lord Cottenham, rever-

(l) *M'Queen v. Farquhar*, 11 Ves. 467.

(m) *Osbaldeston v. Askev*, 1 Russ. 160.

(n) *Green v. Pulsford* 2 Beav. see p. 75.

[1] The title was objected to on the ground of an opinion, by which it appeared, that the father first sold the estate, and then the appointment was devised to make a title, and the purchase deed recited that the contract was made with the father and son. And it was insisted that if the father derived any benefit from the agreement, or even made a previous stipulation that his son should join him in a sale, which there appeared the strongest reason to apprehend, it would have been a fraudulent execution. But Lord Eldon overruled the objection, as it did not appear that the estate sold for less than its value, or that the son got less than the value of his reversionary interest, but merely that he, as the owner of the reversion, acceded to the purchase.

sing the vice-chancellor's decision, held that, as means existed of bringing the objection to a test, the court would do so, before compelling the purchaser to take the title : and required the vendor to file a bill to establish the will against the heir.(o)

An anonymous case is cited by Sir E. Sugden,(p) in which a man having agreed to buy an estate with mines, and objecting that the mines were under a common, over which others had a right of common, Lord Eldon, observing on the improbability of disturbance, and that nominal damages only would probably be given in the event of an action, decreed specific performance ; but the case seems to be of very questionable authority : Sir E. Sugden considers(q) that the decision must have "turned on the improbability of disturbance : but it may reasonably be doubted, whether the supposed absence of any adequate motive for parties to assert their rights by litigation constitutes that sort of improbability upon which a purchaser is bound to rely ; however, in an earlier case, the existence in the crown of a right to the mines under the estate, but without a reservation of a right of entry, was held by Lord Hardwicke to be no objection to the title ; it appearing that no search had been made for mines for upwards of a century, and that probably no mines existed, and that the crown's right never had been and probably never would be exercised ;(r)[1] so a right of re-entry by

Adverse right not likely to be enforced, held not to render title void.

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(o) *Grove v. Bastard*, 2 Phill. 619.

(p) Sug. 519.

(q) *Ibid.* 520.

(r) *Lyddal v. Weston*, 2 Atk. 19. The case seems to have been decided under the idea that the Crown, no right of entry being reserved, could neither work nor authorize others to work the mines, unless they were first opened by the owner of the soil ; but it seems doubtful whether this is good law ; see *Case of Mines*, Plow. 313 ; *Seaman v. Vawdrey*, 16 Ves. 393 ; *Bainbridge on Mines*, 41.

[1] Lord Hardwicke observed, that it would be of mischievous consequence, to allow it to be an objection to a title that it is derived under a grant from the crown in which there is a reservation of such mines, especially as all grants from the crown have, for the most part, such a general reservation ; but he added the fact in the present case is that there has never been an exertion of this right in a single instance, and no pro-

Ch. XVIII. the crown, which the court considers incapable of being enforced, is no objection to the title.<sup>(s)</sup>

Outstanding  
interest,  
when a  
ground for  
reporting  
against title.

Where a necessary party to the title is, neither in law nor equity, subject to the control of the vendor, but has an independent interest, and no evidence is furnished of a legal or equitable obligation on the part of such stranger to concur in the sale, the master should report against the title<sup>(t)</sup> on the ground of such non-concurrence; not that a good title can be made upon the stranger concurring; <sup>(u)</sup>[2] but where such necessary party is bound to concur, as in the case of a mortgagee, the master may report in favor of the title; <sup>(w)</sup> the report, however, should it is conceived, be, that a good title can be shown subject to the incumbrance, and that the incumbrancer is bound

<sup>(s)</sup> *Flower v. Hartopp*, 6 Beav. 476.

<sup>(t)</sup> *Esdaile v. Stephenson*, 6 Mad. 366.

<sup>(u)</sup> *S. C.* as reported in Sug. 412.

<sup>(w)</sup> 6 Mad. 367; Danl. Ch. Prac. by H. 1169.

bability there ever will. The case, we may observe, depended upon this fact.

In the case of *Seaman v. Vowdrey*, which is here referred to, it seems, in 1704 an estate was sold with a reservation of salt works, &c. with a right of entry, and the estate was sold in 1761, and no notice taken of the reservation, and the right had never been exercised; the Master of the Rolls was of opinion that non-user did not, in this case raise the inference that the right was abandoned, and consequently the purchaser, was entitled to take the objection, and his honor distinguished this from the case of *Lyddal v. Weston*, first because it was not alleged that there was no probability of mines, but was rather admitted that there were; secondly, here was the reservation of a right of entry, upon the want of which, Lord Hardwicke laid stress in that case. In the case at the Rolls, the purchaser chose to consider this not as an objection to the title, but as a ground for compensation, and it was decreed accordingly.

[3] In this case, it appeared that the estate was subject to a rent charge, and a term to secure it; and the purchaser's counsel before the master, required the seller to produce a release of it, or evidence that the jointress would release; but although he did not do so, the master reported that the seller could make a good title upon the jointress releasing. To this report, exceptions were taken. The vice-chancellor consulted the chancellor, and they stated their opinion to be, that the report was wrong. It should have been that the seller could not make a good title unless the jointress joined; and the vice-chancellor recommended in future the form of such report to be that the seller could *not* make a good title, because A. is a jointress, and no sufficient evidence has been produced to show that she will release.

\*to concur, not that a good title can be made upon payment of the incumbrance.(x) Ch. XVIII.

If the report be in favor of the title, and be not excepted to, a decree for specific performance will be made on the hearing on further directions, unless, in the interim, any matter appear which affects the title, in which case, although the report have been confirmed, a reference back to the master will be ordered on motion.(y)

Report in favor of title, and no exception, decree for plaintiff unless new matter appear.

If exceptions are taken to the report in favor of the title, the cause should be set down for hearing on further directions at the same time with the exceptions,(z) in order that, if the exceptions are allowed and the vendor do not request a reference back to the master, the purchaser may at once take a decree;(a) if, on hearing the exceptions, the court considers the report erroneous, on the ground of a mistake by the master as to the title which the purchaser can require,(b) or as to the insufficiency of the evidence in support of the title,(c) or as to the construction of an instrument,(d) the title will, at the vendor's request, be again referred, in order that he may have an opportunity of removing the defect; it was held by Sir J. Wigram, V. C., in a recent case, that the reference back is not a matter of course, but depends on the vendor satisfying the court that he has a fresh case to bring before the master;(e) but in a later case before Lord Cottenham, his lordship laid down, as a general rule, that "no special case need be made by the vendor, but that where the report is in favor of the title, and the court holds a different opinion, and he desires an opportunity of making out a better title, the court will deal with the

Exceptions taken: cause should also be set down on further directions.

If exceptions allowed, a fresh reference will be directed at vendor's request.

[529]

(x) See Sug. 419; *Maggennis v. Fallon*, 2 Mol. 575.

(y) *Jewdine v. Alcock*, 1 Mad. 597.

(z) Sug. 412.

(a) See V. C. Wigram's remarks in the judgment in *Daves v. Betts*, 12 Jur. 416.

(b) *Fildes v. Hooker*, 2 Mer.; see p. 429.

(c) *Andrew v. Andrew*, 3 Sim. 390; *Curling v. Flight*, 2 Ph. 613.

(d) *Egerton v. Jones*, 3 Sim. 392, 409; 1 Russ. & M. 694; and see *Portman v. Mill*, *ibid.* 696.

(e) *Daves v. Betts*, 12 Jur. 412; the exceptions were overruled on appeal, 12 Jur. 709.

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report in the view that the master has not fully performed the duty imposed on him, but has prematurely come to a conclusion in favor of the title, and will therefore send it back to him for further investigation; that there is no reason why the same practice should not prevail whether the original reference be made on motion or by decree; but that, in both cases, if the vendor wishes for an opportunity of making a better title, the court should give him the option of doing so, and only conclude the matter when he says he can go no further. (f) Upon the fresh reference, the purchaser seems not to be restricted to his original objections. (g) Exceptions, it appears, should not be general, but should specify the objections to the title. (h)

otherwise  
bill is dis-  
missed.

If the exceptions are allowed, and no reference back be asked by the vendor, his bill will be dismissed at the hearing; or, if the title be considered doubtful, the dismissal may be without giving judgment on the exceptions; (i) but the purchaser if plaintiff may in general elect to take the defective title. (k)

Exceptions  
overruled,  
purchaser  
how far pre-  
cluded from  
other objec-  
tions.

If all the exceptions are overruled, the purchaser cannot make other objections to the title, (l) except, it is conceived, in the case of fresh matter, which affects the title, being discovered subsequently to the date of the master's report. (m)

[\*530]

Report  
against title,  
and no ex-  
ceptions—  
bill dis-  
missed on  
motion..

\*If the report be against the title and be not excepted to, the vendor's bill may be dismissed with costs on motion; (n) if exceptions are taken and are overruled, the court, it appears, will at once discharge the purchaser, without motion. (o)

(f) *Curling v. Flight*, 2 Ph. 616; and see *S. C.*, 12 Jur. 423; and see *Daves v. Betts*, on appeal, 12 Jur. 709.

(g) *Fildes v. Hooker*, 3 Mad. 193; Sug. 411.

(h) *Flower v. Hartopp*, 6 Beav. 476.

(i) *Wilcox v. Bellaers*, Turn. & R. 491; *Robinson v. Milner*, 1 Ha. 578, n.

(k) *Infra*, 533.

(l) *Brooke v. Anon*, 4 Mad. 212.

(m) See *Jeudovine v. Alcock*, 1 Mad. 597.

(n) *Walters v. Pyman*, 19 Ves. 351; *Whitcomb v. Foley*, 6 Mad. 3.

(o) *Taylor v. Martindale*, 1 Y. & C. C. 658.



\* If exceptions are taken to the report against the title, and are overruled, the court will sometimes send the case back to the master ;(*p*) but not, it is conceived, upon mere speculation, nor unless the vendor can satisfy the court of the probability of the title being perfected(*q*) within a reasonable time ;(*r*) and long previous delay, of course, could be a reason for less additional time being allowed ;(*s*) "and the court will not allow a seller to lie by before the master, and then upon further directions, attempt to make a title ;"(*t*) nor will it show any favor to a vendor, who, or whose solicitor, has improperly concealed a defect in the title ;(*u*) nor allow further time, when, owing to the long interval which has elapsed since the contract and the altered situation of the parties, substantial justice would not be done by decreeing specific performance.(*w*)[1]

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Exceptions  
taken and  
allowed—  
reference  
back when  
directed.

So, if no exceptions being taken, the cause comes on for further directions, or for original hearing if the reference (in a suit commenced by bill) were made before hearing, "and the vendor can satisfy the court that he can remove the objection on which the master reported against the title—as where he can procure the concurrence of a party having an interest—specific performance will be decreed without a reference back to the master.(*x*)

If no excep-  
tions, decree  
will be made  
on hearing,  
if vendor can  
then remove  
objections ;  
[531]

(*p*) See *Sidebotham v. Barrington*, 3 Beav. 524; 4 Beav. 110; 5 Beav. 261; and see *Fraser v. Wood*, 8 Beav. 342; *Smith v. Capron*, 13 Jur. 148, and *Chamberlain v. Lee*, 10 Sim. 444; the master may, without any special order, receive further evidence in support of the title; *Cottrell v. Watkins*, 1 Beav. 366; *Troyford v. Trail*, 3 Myl. & Cr. 645.

(*q*) See judgment of V. C. Wigram in *Dawes v. Betts*, 13 Jur. p. 416.

(*r*) *Fraser v. Wood*, 8 Beav. 339; and see *Whittaker v. Whittaker*, cited 10 Ves. 599, and *Leckmere v. Brasier*, 2 Jac. & W. 289.

(*s*) See *Fraser v. Wood*, *supra*.

(*t*) *Esdaille v. Stephenson*, Sug. 412.

(*u*) *Dalby v. Pullen*, 1 Russ. & M. 296.

(*w*) See *Cowgill v. Lord Oxmantown*, 3 Y. & C. 369, 377.

(*x*) *Patten v. Rogers*, 6 Mad. 256; *Dawes v. Betts*, 12 Jur. 416.

[1] The general rule is, that if there is not a good title at the time of the report, the purchaser is entitled to be discharged, because a purchaser is not to be kept for future inquiries. A title is not to be made by instalments, and not what the title is now, but what it was when the master ruled the objections is the state of the title to be pronounced upon. But if the title is that originally produced, although the evidence to support it

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removal of objections, an answer to purchaser's motion to be discharged.

Purchaser's general right to reference of title—how it may be waived.

By acquiescence.

Purchaser after great delay not forced to take clearly bad title.

So, if, the report being against the title, and there being no exceptions, the purchaser moves that he may be discharged from the contract, the vendor may show that the title has been perfected subsequently to the report; *e. g.*, by a private act of parliament.(y)

We have seen that, as a general rule, the purchaser may insist upon a reference as to title; and the court will not tie him down to the objections raised upon the pleadings; he may, however, waive such *prima facie* right wholly or in part; and if he clearly rest his objection merely upon what Lord Eldon describes as "one neat dry point," or, it is conceived, upon a plurality of neat dry points, the court, being satisfied that no other question of title remains open, will make a decree without a prior reference:(z) but he will not be compelled to take a defective title merely because, being plaintiff, he filed his bill with notice of the defect.(a)

Where a purchaser was let into possession, and soon afterwards received the abstract, and retained it for four years without objecting to the title, he was held to have waived his right to a reference;(b) but in a later case it was held that, even after great delay and acquiescence (there being no express waiver,) the court will not compel the purchaser to complete, if the title is manifestly bad.(c)[1]

(y) *Coffin v. Cooper*, 14 Ves. 205.

(z) See *Jenkins v. Hiles*, 6 Ves. 653, 654, and V. C. Wigram's remarks in *Lucas v. James*, 7 Ha. 425.

(a) *Slaplyton v. Scott*, 16 Ves. 272.

(b) *Fleetwood v. Green*, 15 Ves. 594; and see *Margravine of Anspach v. Noel*, 1 Mad. 310.

(c) *Blackford v. Kirkpatrick*, 6 Beav. 232; and see *Warren v. Richardson*, You. 1.

has varied, the purchaser is bound; for the evidence, and not the title is altered, and evidence which may satisfy one man's mind, may be unsatisfactory to another.

[1] Where possession was given under the contract, and the abstract was delivered, and the purchaser allowed more than two years to elapse before he took any objection to the title, which was about one year and a half after the time when the contract should have been completed, and in the meantime he had made alterations in the houses and let them, and

\*According to the old practice, there were two ways of framing a decree in a suit for specific performance: [1] Ch. XVII.  
Decree for  
specific per.

written several letters, apologizing for not having paid the purchase-money, he was decreed, by his conduct, to have accepted the title. The alterations of the premises, and the letting them, were considered acts strongly indicating an acceptance of the title, and the letters appeared to be founded upon an acceptance of the title; for, till the title was accepted, the purchaser was not bound to pay the money. In a still later case, the purchaser, by his answer, swore that he did not mean to waive his objections to the title, but the court said that if a party acts in a manner from which it may be implied he does not mean to object to the title, he cannot afterwards, at a distance of time when evidence, perhaps, is lost, insist upon objections to the title. In a case which arose out of a sale in bankruptcy, where he purchased with knowledge of an objection to the title, and, after some months, granted a lease for fourteen years to a son-in-law of the bankrupt, who was in possession under the bankrupt, the purchaser was held to have waived the objections to the title which really did exist. It was considered that he had purchased the estate to keep it in his family, to keep possession while he could, and then shuffle with objection to the title. The purchaser intended to give the lessee possession under his title as purchaser, and intended to waive all objections to the title, for there were no objections of which he had not, from the very first, been fully aware. The ground relied upon, that the purchaser intended to waive all objections, is not reconcilable with the other ground, that he intended to shuffle with the title. The mere grant of a lease cannot, of itself, be deemed an acceptance of a bad title; but, coupled with other circumstances, it was, in the above case, held to amount to a waiver of the objections. In a later case, where, under an agreement for a lease the tenant entered into possession, and, without requiring a title, returned a draft of a lease sent by the lessor with alterations, which were acceded to, and the draft was engrossed, and then disputes arising, a bill was filed by the lessor, for a specific performance, and the lessee insisted upon his right to have the title produced, the court was of opinion that he had, by his conduct, waived all objections to the title. See Sug. on Vend., vol. 1, pp. 9, 10, and cases.

[1] The following is the form of a decree for specific performance:—

[Title of Cause.]

This cause being brought to hearing for further directions, on the report of A. B., the master, to whom the same stood referred, and the said report, together with the pleadings and proofs, having been read, and Mr. C. D. of counsel for the complainant, and Mr. E. F. and Mr. G. H., of counsel for the defendant, having been heard, and the court having duly considered the said master's report, pleadings, proofs, and arguments, and it appearing to this court that a good title can be made by the complainant, to the premises, comprised in the agreement between the parties to this cause, mentioned in the pleadings therein, and dated the — day of —, it is thereupon ordered, adjudged, and decreed, and this court, by virtue of the power therein vested, doth order, adjudge, and decree, that the said agreement so made and entered into between the com-

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formance—  
its form.

the one was to declare that the plaintiff was entitled to a specific performance if a good title could be shown, and then to direct a reference as to the title; the other, to refer the title to the master, and to follow up that direction by a declaration that if a good title was shown, the agreement ought to be specifically performed. (d) The mere direction of the reference seems, however, to be an implied declaration of the right to specific performance: (e) so, that, on the hearing on further directions, the court will not enter upon any other defence set up by the answer; (f) and such a declaration seems to have been at one time not unfrequently omitted. (g) The present practice, however, in suits commenced by bill, and where, by reason of the contract itself having been disputed, the cause is heard before a reference to the master, seems to be, to declare absolutely that the plaintiff is entitled to a specific performance of the agreement, and to refer it to the master to inquire whether a good title can be made; not to declare that the plaintiff is entitled, &c., if a good title can

(d) *Per* Lord Eldon in *Stevens v. Guppy*, 3 Russ. p. 182.

(e) See *Mole v. Smith*. Jac. 495.

(f) *Le Grand v. Whitehead*, 1 Russ. 309.

(g) See Seton on Decrees, 210.

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plainant and defendant, and duly proved in this cause, be specifically performed. And it is further ordered and decreed, that the said complainant execute and deliver to the defendant a proper and sufficient conveyance in fee, of the premises comprised in the said agreement between the parties, and particularly described therein, to be approved of by A. B. one of the masters of this court, residing in the county of Saratoga, in case the parties differ about the same. And it is further ordered and decreed, that the said defendant do, upon the tender or delivery to him of such conveyance, pay unto the said complainant the sum of \$—, the balance of the purchase-money of said premises reported by the said master to be still due, with interest thereon, at the rate of seven per cent., from the date of the said master's report. And it is further ordered and decreed that the said defendant do pay to the complainant the costs of this suit, to be taxed. And it is further ordered and decreed, that the said complainant have execution against the said defendant for the said sum of \$—, the balance of said purchase-money reported by the master to be due, with interest from the date of his report, and for the costs, to be taxed, as aforesaid, according to the course and practice of the court. And either of the parties is to be at liberty to apply to this court, as occasion may require. See 2 Barb. Ch. Pract., pp. 453, 454.

be made : (h) and, in such a case, the court, in directing a reference, will not direct an inquiry as to when the title was first shown. (i) We have already noticed the form of the order of reference which, in a suit commenced by claim, takes the place of the decree for specific performance on the original hearing (k)

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Where the agreement was in writing, and a parol variation, not set up by the answer, came out on the cross-examination of the defendant's agent, who was one of the \*plaintiff's witnesses, the court seemed to consider that this was a proper subject for inquiry before finally disposing of the case; but, on the plaintiff consenting to adopt the parol variation as a part of the contract, specific performance was at once decreed with costs. (l)

Plaintiff may take a decree adopting parol variation proved by defendant's agent.  
[533]

The purchaser, it appears, may elect to take a defective title : (m) "the covenants being so framed as not to leave the seller exposed to an action on account of the flaw: but where the conveyance would be merely void, and might embarrass persons claiming under the same title as the seller," the purchaser seems to have no such right. (n)

May elect to take defective title.

We may here remark, that a decree for specific performance, in a suit between vendor and purchaser, is no protection against the adverse claims of persons not parties to the suit : (o) except so far as that, if any particular question of title be decided in favor of the vendor, such decision forms a precedent which would probably be followed on a future occasion.

Decree for specific performance, no bar to claims by persons not parties.

Where the plaintiff, in his bill, offered to perform an ambiguous agreement, "according to the true intent and meaning thereof," but uniformly, up to the hearing, insisted on his own construction, as the only contract between himself and the defendants, not offering to take up the

Plaintiff not allowed to take decree according to that construction of agreement which he had repudiated.

(h) *Clive v. Beaumont*, 1 De G. & S., see p. 406; *Gibbins v. North Eastern Metropolitan Asylum*, 11 Beav. see p. 5.

(i) S. C.

(k) *Supra*, p. 523.

(l) *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 57.

(m) *Bennett v. Fowler*, 2 Beav. 302.

(n) Sug. 420.

(o) See *Wood v. White*, 4 Myl. & C. p. 470.

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other construction which the defendants were at one time willing to perform, Sir T. Plumer held the case to be perfectly different from one where the plaintiff calls upon the court to declare the true construction, submitting to perform according to the same; and, his opinion being against the plaintiff's construction, he refused to enforce specific performance against the defendants, according to the construction contended for by their answer.(p)[1]

[\*534]

Defendant may take decree with parol variations of written contract offered by purchaser's bill.

\*And where the plaintiff by his bill, praying the performance of a written agreement, offers to the defendant the benefit of certain subsequent parol variations, the court will decree specific performance with the variations, if the defendant elect to take advantage of them; or otherwise of the original agreement.(q)[2]

Parol variation proved by defendant —no decree for plaintiff; but defendant may take decree without crossbill.

So, where the plaintiff, by his bill, offers to perform the agreement,(r) and the defendant proves a parol variation, the court will, at his request, without a cross bill, decree specific performance with the variation, and even fix the plaintiff with the costs.(s)[3]

(p) *Clowes v. Higginson*, 1 Ves. & B., see p. 535.

(q) *Robinson v. Page*, 3 Russ. 114.

(r) 1 C. P. Coop. N. R. 353.

(s) *Fife v. Clayton*, 13 Ves. 546; *S. C.*, 1 C. P. Coop. N. R. 351; *Gwynn v. Lethbridge*, 14 Ves. 595; see *Higginson v. Clowes*, 15 Ves. 525.

[1] In this case, there were several lots, and it was stated after two of them, that the timber on them was to be paid for. The particulars were silent as to the timber on the other lots, which was of considerably greater value; but, there was a general condition that all the timber and timber-like trees, down to 1s. per stick inclusive, should be taken at a fair valuation. The purchaser of the lots, to which no statement was annexed, claimed the timber without paying for it; and the court thought that a purchaser might be so fairly impressed with that idea, notwithstanding the general condition, that it refused to compel him to perform the contract, according to the seller's construction.

[2] Unquestionably, waiver, even by parol, would be a sufficient answer to the plaintiff's claim; but, the circumstances of waiver and abandonment must amount to a total dissolution of the contract, placing the parties in the same situation in which they stood before the agreement was entered into.

[3] Where the plaintiff, in a bill for specific performance, cannot prove his agreement, as laid; but the defendant, who proves the agreement to be different, offers to perform specifically the agreement which he represents; the court will execute the agreement as proved by the answer,

The decree should also, (unless the particular circumstances of the case render such a direction unnecessary,) direct the usual accounts to be taken of the rents and profits of the estate, and of interest on the purchase-money, and should order payment of the balance due from the purchaser, and the execution of the conveyance and delivery of the deeds by the vendor : (t) and an account may be decreed on the footing of the agreement ; although, as in the case of a lease, the subject-matter of the contract has expired by lapse of time before the hearing. (u)

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Decree should direct accounts, &amp;c.

Where part of the subject-matter of the contract is abstracted by the vendor *pendente lite*, equity will give relief, even upon supplemental bill after a decree for specific performance ; and, in order to assess the amount of damages, will allow the plaintiff to bring an action to ascertain *quantum damnificatus*, and require the defendant to admit the necessary facts. (w)

If, on a bill filed by the vendor, the purchaser be \*considered unable to pay what is due in respect of purchase-money, interest and costs, the decree may direct that, in default of payment, the master do proceed to a sale of the premises for the purpose of satisfying the amount so due ; and that the deficiency, if any, be paid by the purchaser : (x) and the vendor can prove as a specialty creditor (y) in respect of such deficiency (z) in a suit instituted for the administration of the assets of the purchaser ; the amount to be found due upon the reference to the master constituting a judgment debt within the 1 and 2 Vict. c. 110, s. 13. (a)

[\*535]

Decree in vendor's suit may direct a sale, and payment of the deficiency by purchaser.

(t) See Seton on Decrees, 212, 214.

(u) *Wilkinson v. Torkington*, 2 Y. & C., Ex. 726.

(w) *Nelson v. Bridges*, 2 Beav. 239, 244.

(x) See *Haydon v. Bell*, 1 Beav. 337, 343 ; *Rome v. Young*, 3 Y. & C. 199 ; *Duke of Beaufort v. Phillips*, 1 De G. & S. 321.

(y) S. C.

(z) *Rome v. Young*, 4 Y. & C. 204.

(a) *Duke of Beaufort v. Phillips*, 1 De G. & S. 321.

without a cross-bill, although the plaintiff should wish to have the bill dismissed, if the court think the defendant entitled to a specific performance.

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As to conveyance being settled by master.

[\*536]

Course of proceeding in master's office.

The usual direction as to the conveyance is that the master settle it "if the parties differ about the same;(b) these latter words will, however, it seems, be omitted, if an infant is a necessary party to the conveyance;(c) or if it will, by statute, operate to convey the infant's estate, although he may not actually be a party;(d) but not merely on the ground of his being interested in the estate, as in the case of an infant *cestui que trust* whose trustees have power to sell and give receipts.(e) In one case the decree went on to direct that the master, in settling the conveyance, should insert therein a particular clause in favor of the plaintiff;(f) but it does not appear that the court will, in general, embarrass the master with any positive direction, or declaration as to the rights of the parties;(g) if the decree omit the usual direction as to the conveyance, the omission may be supplied on petition.(h)

\*If the matter comes before the master, the practice, as settled by the 76th order of April, 1828,(i) is, for the party entitled to prepare the conveyance to bring the draft thereof into the master's office, and give notice of his having so done to the other party; and, at any time within eight days after such notice, such other party may inspect the same without fee, and may take a copy thereof if he thinks fit; and at or before the expiration of the eight days, or such further time as the master shall in his discretion allow, such other party must either agree to adopt the conveyance, or signify his dissent therefrom, and thereupon he may deliver a statement in writing of the alterations which he proposes in the draft of the conveyance. But if he deliver no such statement in writing, or if the party bringing in the draft refuse to adopt the proposed alterations, the master proceeds to settle the con-

(b) Seton on Decrees, 212.

(c) *Calvert v. Godfrey*, 2 Beav. 267.

(d) *Cheese v. Cheese*, 15 L. J., N. S., Ch. 28.

(e) *Richardson v. Ward*, 11 Beav. 378.

(f) *Blakesley v. Whildon*, 1 Ha. 183.

(g) *Williams v. Trale*, 6 Ha. 254.

(h) *Trevelyan v. Charter*, 9 Beav. 140.

(i) See Edwards' Orders, 27, and Daniel's Ch. Prac. by H. 1191.



veyance, according to the practice of the court. And in case the master adopts the proposed alterations, the costs of the proceeding are borne by the party preparing the draft.[1]

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The usual course is, for the master to take the opinion of some conveyancing counsel upon the draft conveyance and objections, as in the case of an abstract.(k)

Draft laid before counsel.

If an appeal is pending, the master must nevertheless proceed to settle the conveyance, and only its execution will be stayed.(l)

Effect of appeal.

The draft, when settled by the master, is engrossed in his office, and, according to the books of practice, "he signifies his allowance of it by signing his name in the first and last skins, in the following form, in the margin of the indenture; A. v. B. I approve of and allow this "indenture, being the same mentioned in my report dated the        day of        . He then signs a report or certificate of his having approved and allowed the engrossment, which must be filed in the usual way;"(m) but upon this, as on other points, the practice of the several masters is believed not to be uniform.

Engrossment of draft, and allowance thereof by master.

[\*537]

Exceptions lie to the master's certificate;(n) but if no exceptions are filed the conveyance must be executed by the parties.(o)

Exceptions to master's certificate.

In various cases of necessary parties being under disabilities, a conveyance might, until recently, have been procured under the 1 Will. IV. c. 60, and 4 and 5 Will. IV. c. 23;(p) and may now be procured under the 13 and 14 Vict. c. 60, the principal provisions of which (q) we have already noticed.(r)

Conveyance under the Trustees act, 1850.

(k) *Supra*, p. 523; Dan. Ch. Prac. by H. 1191; see *Lbyd v. Griffith*, 3 Atk. 264, 266.

(l) *Gwynn v. Lethbridge*, 14 Ves. 585.

(m) Dan. Ch. Prac. by H. 1192, citing 1 Turn. & V. 422.

(n) *Wakeman v. Dutchess of Rutland*, 3 Ves. 504.

(o) 1 Dan. Ch. Prac. by H. 1192.

(p) See *In re Lowe's estate*, 2 Ph. 690; and on the acts generally, see Hill on Trustees, 275, *et seq.*

(q) See, in particular, sect. 30, *supra*, 280.

(r) *Supra*, 277, *et seq.*

[1] See Barb. Ch. Pr. vol. 1, p. 541, 542.

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Conveyance  
under 1  
Will. 4, c.  
66, in case  
of lunatic  
vendor.

And by the 1 Will. IV. c. 65,(s) when any person having contracted to sell any land becomes lunatic, and a specific performance of the contract, either wholly or as the same remains to be performed, has been decreed either before or after the lunacy, the committee of the estate of the lunatic may, in his place, by direction of the Lord Chancellor, signified by an order to be made on the petition of the plaintiff or any of the plaintiffs in the suit, convey the land in pursuance of the decree, to such person and in such manner as the chancellor shall direct; and the purchase-money, or so much thereof as remains unpaid, is to be paid to the committee.(t)

Conveyance  
how to be  
obtained  
when party  
refuses to  
convey.

[\*538]

Two modes of proceeding might, until recently, have been adopted when a party refused upon order to execute \*the necessary assurance; the first under the 1 Will. IV. c. 34,(u) which authorized the court to appoint one of the masters to execute the conveyance; but only when the recusant party had been in prison for two months;(w) or, secondly, the party ordered to convey might, upon his refusal or default for twenty-eight days after tender of the conveyance, be treated as a trustee, and a conveyance might be obtained under the 1 Will. IV. c. 60, s. 8;(x) the new Trustee Act, repealing the 1 Will. IV. c. 60, contains, as we have seen, an express provision authorizing the court to declare that any of the parties to a suit for specific performance are trustees within the meaning of the act, and to make a similar declaration as respects unborn persons in certain cases;(y) and will probably, in cases coming within its provisions, supersede, although it does not repeal, the 1 Will. IV. c. 36.

Interest on  
money re-  
funded on  
appeal, not  
generally  
allowed.

We may here remark that where money has been paid under a decree or order, which is reversed on appeal, interest will not be allowed except by special direction.(z)

(s) Which is not repealed by the 13 and 14 Vict. c. 60.

(t) Sect. 27.

(u) See sect. 15, rule 15.

(w) See 9 Beav. 275.

(x) See *Warburton v. Vaughan*, 4 Y. & C., Ex. 247; *Thomas v. Gwynne*, 9 Beav. 275.

(y) 13 and 14 Vict. c. 60, s. 30.

(z) *Parker v. Morrell*, 2 Ph. 469; and see 3 Y. & C. 131.

Where the vendor's bill is dismissed for want of title, the court will direct him, if he has received the deposit, to repay it with interest; (a) or, if in the hands of the auctioneer, would probably direct the vendor to concur with the purchaser in an order for its payment; (b) but, in a recent case, where the vendor's bill was dismissed on the ground of laches, and without any decision on the question of title, *Sir J. Wigram, V. C.*, refused to order the return of the deposit; and intimated that such an order should only be made in cases where the decree dismissing the \*bill would entitle the purchaser to an injunction if the vendor attempt to enforce his legal remedies upon the contract; (c) the return of the deposit cannot (d) be ordered when the purchaser's bill is dismissed; but, in a recent case, *V. C., K. Bruce*, in adhering to the rule, refused the vendor costs, on his declining to return the deposit. (e)

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Decree dismissing vendor's bill—return of deposit when ordered.

[\*539]

If a bill is dismissed on grounds which would not in themselves be a defence to an action at law, it does not appear to be necessary to express in the decree that the dismissal is without prejudice to the legal remedy. (f)

#### (11.) *As to costs.*

In equity, as at law, the party who fails is, *prima facie*, liable to costs; (g) [1] and although the question of costs

Costs, as a general rule, are borne by unsuccessful party.

(a) *Hayes v. Bailey*, cited Sug. 814; *Lord Anson v. Hodges*, 5 Sim. 227.

(b) *Bryant v. Busk*, 4 Russ., see p. 6.

(c) *Southcomb v. Bishop of Exeter*, Ha., see p. 225.

(d) *Supra*, 88.

(e) *Gee v. Pearse*, 2 De G. & S., see 346.

(f) See *Wedgwood v. Adams*, 8 Beav. 105.

(g) *Vancouver v. Bliss*, 11 Ves., see 463.

[1] "The result an attentive examination of the cases" says Beames, in the Introduction to his Treatise on Costs, "will it is apprehended, serve to demonstrate, that there are two general principles on which courts of equity generally act, in giving or withholding costs; namely the remuneration of the successful party, and the punishment of the unsuccessful party. In some instances, remuneration, appears to be the sole, or at least, the leading principle; and in other instances, punishment seems to be the sole, or at least the leading principle; whilst in many instances, both remuneration and punishment may be considered to be the combin-

rests entirely in the discretion of the court, (h) yet it is for the unsuccessful litigant to show, (if he can,) the existence

(A) Sug. 821; *Garahy v. Malone*, 1 H. L. C. 81.

ed or joint principle, it being, in these latter instances, difficult to ascertain which of them is the leading or preponderating principle, neither of them being more prominent than the other. Thus, when a court of equity awards costs to a trustee, his *remuneration* is the sole object, because the court can never be inferred to intend any punishment to the *cestui que trust*, in making him, or the fund which belongs to him, pay those costs; on the contrary, it requires from such *cestui que trust* the discharge of a moral duty; lest the gratuitous performance of a judiciary obligation, which can be attended with no benefit to the trustee, should be accompanied with a pecuniary loss to him. Other instances, where *remuneration* is the sole principle, may be mentioned. Thus, for example, where costs are given to mortgagees, conducting themselves properly; and where costs out of pocket, are given to defendants in suits for discovery, and to defendants, not examining in chief, in suits to perpetuate testimony. In other instances, *punishment* may be considered to be the sole, or at least, the leading principle. The instances of this kind, may be classed under positive and negative. By the term positive, we mean cases where a party has been ordered to pay costs, although he filled a character, which, on ordinary occasions, so far from subjecting him to the payment of costs, would have entitled him to receive costs. Some very striking instances of this description, may be discovered by recurring to those cases where trustees have been found amongst those cases, where mortgagees have been ordered to pay costs. In all these cases, punishment, in the larger sense of that term, as applied to costs, must, it is apprehended, be considered the leading, if not the sole principle. Examples of the negative kind are very numerous. We mean by examples of the negative kind, cases where costs have been withheld from parties, who, as the result of the characters they filled, would have been, in ordinary circumstances, entitled to receive their costs. Thus, as we have already remarked, mortgagees, if they conduct themselves properly, are generally entitled to their costs, upon the remunerative principle: but, in the case of an unconscientious defence, and in several other instances mentioned in the following pages, the remunerative principle gives way to the punitory principle, and mortgagees have been deprived of their costs. In all such cases, as the parties have forfeited their right to the benefit of that remunerative principle which would have entitled them to their costs, the other principle comes into action, and they are so far punished, as to be deprived of those costs which their character would, in ordinary circumstances, have entitled them to receive. In these cases, punishment, in the milder sense of the term, as applied to costs, must, it is apprehended, be deemed the leading, if not the sole principle. The same observation applies to trustees, when they are deprived of their costs. In depriving such persons of their costs, the principle is their punishment, not the remuneration of the other party; and although some

of circumstances sufficient to negative his *prima facie* liability;(i) and the present disposition of the courts appears

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(i) *Vancouver v. Bliss, ubi supra,*

benefit results to the latter, namely, that pecuniary benefit precisely which is equivalent to the amount of such costs, this is a consequence not contemplated, or regarded by the court, however unavoidable in effect. This observation applies with equal, if not with more force to those cases, where parties who in ordinary events would have received their costs, have, on the contrary, been ordered to pay costs. It is, indeed, an obvious truth, that the punishment of the one party by making him pay costs, or, depriving him of his right to receive them, must in every instance be attended with a benefit to the other party; but, in the cases to which we allude, that benefit, is not the leading, or main object of the court; it is rather an unavoidable consequence, in the present mode of disposing of costs, or, if capable of being stated higher, it is at all events a secondary, or inferior object, leaving the punishment of the other party as the leading principle of the decision. We have observed, that, in the generality of cases, the remuneration of the one party, and the punishment of the other party, may be considered to be combined in the principle on which costs are awarded. The reader is not, however, to conclude, that we use the term *remuneration* either in an enlarged sense, or, its more ordinary sense. We use the term as equivalent with reimbursement, or re-payment. But, qualified as the sense is in which we use the term, the remuneration in cases between party and party is, generally speaking, very imperfect it is only of a part of the costs; and as the punishment, it follows, is bounded by the measure of the remuneration, that term is used only in such restricted sense. Complete justice, however, between the litigating parties, as individuals, never can be done, unless the successful party, in addition to the recovery of his right, is fully reimbursed the expenses he has incurred in the pursuit of such right. But, our municipal courts do not in ordinary cases award this measure of justice, proceeding, possibly, upon some latent and unavowed principle of polity which discourages litigation by imposing, even upon the successful party, some degree of pecuniary loss. In ordinary cases, where costs are given as between solicitor and client, it is in the greater proportion. As in cases of the latter description, the remuneratory principle is carried further, so its operation is more distinctly evident; but its existence, is not more certain than in other cases. In charity cases, the heir, when he does not make an improper point, has frequently this measure of costs awarded him. When we state our impression, that the leading principles on which Courts of Equity proceed in awarding, or withholding costs, are remuneration and punishment, we are fully aware, that some of the cases to which we have alluded as instances where punishment has been the leading principle, seem rather to point at remuneration, as the leading principle. The cases from which many of the doctrines with regard to costs are drawn, are but too frequently very dark, and indicate obscurely the principles on which they have been decided. Amidst these cases we

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to be, to adhere, with considerable strictness, to the general rule. It was observed by Lord *Cottenham*, C., in a recent case, "Parties may have more or less reason for coming here; but the question is, whether those who are

have been compelled to search for the principle. If we have not reached moral certainty, but, if, on the contrary, the language of some of the cases may be thought to be at variance with our conclusions, let it be recollected, that the cases themselves are not always consistent, and that great names clash with names of equal greatness, when allusion is made to the principles on which costs are given, or withheld in particular instances. In our own defence, we should also make another observation. When we say, that the leading principles of awarding, or withholding, costs are, in our opinion, remuneration and punishment, we must not be understood to assert that Courts of Equity invariably dispose of every question of costs by recurring to the one, or the other, or, both of these principles. These principles have been adopted in order, to promote justice; but their operation would sometimes destroy it. As they ought not to be suffered to defeat that purpose which is the sole motive of their adoption because that would be to permit the means to defeat the end, they must of necessity be suspended, whenever they are destructive of, or inconsistent with justice. To some such reasoning as this we must probably have recourse, if we would trace the principles of some of those cases where courts of equity have given no costs to either party; cases, in which, consistently with the first rules of justice, there can be found no opening for the application of the principles of remuneration and punishment separately, or for the application of both of them in combination. Instances of this kind are to be found in suits of partition, as applied to the costs up to the period of the commission. In such suits, no costs are given on either side up to the period we have mentioned; and although the reason on which this rule is usually stated to rest, is analogy to the rule at law, yet, better reason seems to present itself in the utter inapplicability of the principles on which costs are generally given, or withheld, to a suit of that particular description. There is also another class of cases in which the court, satisfied with the honesty of intention of the unsuccessful party, allowing for the difficult situation in which he was placed, and for the infirmity of human judgment, and, perceiving, that the remuneration of the successful party could alone be obtained at the expense, and, so far, by the punishment of his unsuccessful opponent, has given no costs against the party who failed. We allude to the case of a purchaser who has declined to complete, on a fair objection to the title, although the court has ultimately overruled the objection. In this case, justice seems to require, that neither of the principles should be acted upon. The punitory principle appears inapplicable to an unsuccessful party, who has paused upon a question, raising difficulties in the minds of those most qualified to judge, whilst the existence of a fair doubt as to the vendor's title seems a sufficient ground to suspend that remunerating principle, which would otherwise have been conclusive in his favor upon the question of costs."

right, or those who are wrong, are to pay the costs of their Ch. XVIII.  
so doing. The rule I always act upon is, to order costs  
to be paid by those who are wrong :"(k)[2]

(k) *Hunter v. Nockolds*, 2 Ph. 545; and see *Green v. Briggs*, 6 Ha. 633,  
and *Earl Nelson v. Lord Bridport*, 10 Beav. 305.

[2] In a court of equity as well as in a court of law, the prevailing party is *prima facie*, entitled to costs. *Saunders v. Frost*, 5 Pick. 260. Costs are in the sound discretion of the court. *Garr v. Bright*, 1 Barb. Ch. Rep. 157; *Brooks v. Byam*, 2 Story's Rep. 553. But a party succeeding upon the merits, is in general entitled to costs. *Garr v. Bright*, 1 Barb. Ch. Rep. 157. Where a plaintiff dismisses his own bill, or suffers it to be dismissed for want of prosecution, or it is dismissed on general demurrer for want of equity, the defendant is entitled to costs. *Ib.* Whether costs ought to be decreed by a court of chancery, is always a question which addresses itself to the sound discretion of the chancellor. *Coleman v. Moore*, 3 Litt. 355; *Tobinson v. Ward*, 2 Conn. Rep. 396; *Methodist Episcopal Church v. Jacques*, 1 Johns. Ch. Rep. 65; *Nicoll v. Trustees of Huntington*, 1 Johns. Ch. Rep. 166. *Cowles v. Whitman*, 10 Conn. Rep. 121. See also, *Eastburn v. Kirbe*, 2 John. Ch. Rep. 317; *Getman's ex'rs. v. Beardsley*, 2 John. Ch. Rep. 274; *Williams v. Wilkins*, 3 John. Ch. Rep. 65; *Travis v. Waters*, on appeal, 12 John. Rep. 500.

At law, the costs abide the event of the action, by the vendor or purchaser. In equity also, the person who fails in the suit, must *prima facie*, be deemed liable to the costs; and it is not material that the seller is a trustee and not beneficially entitled to the property, or that the purchaser is laying out trust money. But still, although this is the general rule, yet costs in equity rest entirely in the breast of the court; for the *prima facie* claim to costs, may be rebutted by the particular circumstances of the case; and it is for the court to decide whether these circumstances are, or are not, sufficient to rebut the claim. In *Staines v. Morris*, 1 Ves. & Bea. 15, 16.

Lord Eldon said, that as to the costs of the suit in equity, it is in many cases very hard that costs should follow the event of the cause, yet all his experience had persuaded him, that it was much to be wished, that the course of the court was so. Certainly however, that was not the present course of the court. Where there is a fair case for consideration, it is not the course to visit the party who fails, with costs. In the case itself, although Lord Eldon held that the purchaser was wrong, in resisting a covenant, which he was bound to enter into; yet as the master's opinion had been the other way, and the judges at law, would not decide the case, until the opinion of the court of chancery, and professional men had differed upon the question, it would, he said, be too presumptuous in him, to set such value upon his own opinion, by marking the resistance of the purchaser with costs and therefore, he made the decree without costs. See *Travis v. Waters*, on appeal, 12 Johns. Rep. 500; *Williams v. Wilkins*, 3 Johns. Ch. Rep. 65; *Getman's ex'rs. v. Beardsley*, 2 John. Ch. Rep. 274; *Eastburn v. Kirbe*, 2 Johns. Ch. Rep. 217; *Methodist Episcopal Church v. Jacques*, 1 John. Ch. Rep. 65; *Nicoll v. Trustees of Huntington*, 1 Johns. Ch. Rep. 166, 182.

Ch. XVIII. \*The cases upon the subject may be conveniently classified as follows, viz.

1st, Cases where the general rule, fixing the unsuccessful litigant with costs, is merely allowed to operate.

2ndly, Cases where it is enforced with more than ordinary stringency.

3rdly, Cases where it is modified, so as to deprive the successful litigant of his costs, wholly or in part.

And 4thly, Cases where the successful litigant is wholly or in part fixed with payment of costs.

Cases where  
general rule  
is allowed  
to operate.

As to the 1st class of cases.—A purchaser resisting specific performance, on grounds which the court considers clearly untenable, will not be relieved from costs because he acted under counsel's opinion ;(*l*)[1] or even upon the recommendation of the Master :(*m*) so where he is held by his conduct to have waived the usual reference upon the title,(*n*) or any particular objection arising on the title,(*o*) and he has rested his defence on the question of title, the decree against him will be with costs. So, where the vendor's bill is dismissed merely for want of title, and the title is clearly bad, the decree against him is with costs,(*p*) although he be merely a trustee for sale,(*q*) or although the title have become defective through the accidental destruction of the deeds subsequently to the contract :(*r*) so, where a purchaser had objected that a good title could not be shown unless certain accounts were taken, and, this being resisted, each party filed a bill for specific \*performance, the court, holding the purchaser

[\*541]

(*l*) *Making v. Hill*, 1 Cox. 186; and see *Firmin v. Pullin*, 12 Jur. 410, where it would appear that a trustee acting under advice was nevertheless, fixed with costs.

(*m*) *Earl Nelson v. Lord Bridport*, 10 Beav. 305.

(*n*) *Fleetwood v. Green*, 15 Ves. 595; *Margravine of Anspach v. Noel*, 1 Madd. 317.

(*o*) *Burnell v. Brown*, 1 J. & W. 175.

(*p*) *Walters v. Pyman*, 19 Ves. 351.

(*q*) *Edward v. Harvey*, G. Coop. 40.

(*r*) *Bryant v. Busk*, 4 Russ. 1, 5.

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[1] For the court cannot allow the mistaken advice of a third person, to operate to the disadvantage of the party who is clearly in the right.



to be right, made a decree in the second suit, and gave him the costs of both suits.(s)[1] Ch. XVIII.

As to the 2nd class of cases.—A vendor obtaining a decree for specific performance has been held entitled to costs on the special ground of the purchaser having persisted in an objection to the title which he knew had been decided against another purchaser in a former suit ;(t) so, where a bill is dismissed on the ground of misrepresentation,(u) or fraud, or contains groundless imputations of moral(w) fraud against the defendant,(x) or where the claim is dishonorable and contrary to moral equity,(y) or against a clear stipulation in the contract,(z) the dismissal will be with costs: so, where the unsuccessful litigant has acted fraudulently in the subject-matter of the suit, or has acted vexatiously, and refused fair offers of accommodation, the decree against him will generally be with costs.(a)

As to the 3rd class of cases.(b)[2]—A vendor obtaining

(s) *Burton v. Todd*, and *Todd v. Gee*, 1 Sw. 255 262.

(t) *Biscoe v. Wilks*, 3 Mer. 456.

(u) *Buzton v. Lister*, 3 Atk., see 387,

(w) See the conclusion of V. C. Wigram's judgment in *Marshall v. Sladden*, 7 Ha. 444.

(x) Beames on Costs, 109; *Scott v. Dunbar*, 1 Moll. 442, 460; *Langley v. Fisher*, 9 Beav. 90; see *Glascott v. Lang*, 2 Ph. 310, 322; *Knight v. Majoribanks*, 2 Mac. & G. 16.

(y) *Davis v. Symonds*, 1 Cox. 402, 408, and other cases cited in Beames on Costs, 37.

(z) *Williams v. Edwards*, 2 Sim. 78, 83.

(a) Beames on Costs, 109, and cases cited.

(b) *Ibid.* 39.

[1] The original bill was dismissed with costs because the seller, apprised of the objections, instituted a premature and improper suit, omitting to provide the only proper mode of settling the question. The purchaser had no means of obtaining a specific performance, but by the institution of the second suit, and there was no inconsistency on his part, as it was necessary that the accounts should be taken.

[2] Costs to neither party, where both have claimed too much. *Righter v. Stall*, 3 Sand. Ch. Rep. 608. In proper cases, a bill may be dismissed without awarding costs to the defendant. *Brooks v. Byam*, 2 Story's Rep. 554. Where the allegations in the plaintiff's bill denied by the defendants, are not so supported by the proofs that the court can decree in favor of the plaintiff, yet if the defendants appear not to have been full and can-

Ch. XVIII. a decree, has been refused costs on the ground of his having unsuccessfully contended that the purchaser had waived his right to investigate the title;(c) so, a vendor has been refused costs, where the purchaser's objection to the title, although overruled, has been considered a fair objection,(d)[3] or has been occasioned by the vendor or

is modified,  
so as to de-  
prive suc-  
cessful lit-  
igant of costs  
wholly or in  
part.

(c) *M'Queen v. Farquhar*, 11 Ves. 482; *Sidebotham v. Barrington*, 5 Beav. 261.

(d) *Cox v. Chamberlain*, 4 Ves. 631; *Staines v. Morris*, 1 Ves. & B. 8; *Aislalie v. Rice*, 3 Madd. see 261; *Thorpe v. Freer*, 4 Madd. 466.

did in their answers, but to have suppressed some facts which they feared might operate in the plaintiff's favor, the bill will be dismissed without costs. *Griffin v. Pleasant*, 1 Iredell's Eq. Rep. 152. When the same solicitor who files the plaintiff's bill, files also the answer of some of the defendants, costs will not be allowed to those defendants, though the bill be dismissed with costs as to others. *Quinn v. Patton*, 2 Iredell's Eq. Rep. 48. Where plaintiff has probable cause for seeking the aid of the court, but failed in establishing his title, but his defendant showed none or no better title to the property in dispute, the bill was dismissed without costs on either side. *Nicoll v. Trustees of Huntington*, 1 Johns. Ch. Rep. 166. Where a bill makes unfounded charges of fraud, but the plaintiffs are infants when the matters which the bill seeks to investigate occur, and they have an apparent cause for demanding an investigation, and may have been misled into the imputations by false rumors, although the bill is dismissed, it will be without costs. *Wade v. Dick*, 1 Iredell's Eq. Rep. 313. Where upon a bill to set aside a deed obtained by a son from an aged mother, on the ground of fraud, imposition, and incapacity of the grantor, the court decided there was not proof to support the allegations, and therefore they dismissed the bill, yet they dismissed it without costs, because suspicions were excited by some part of the testimony, as to the fairness of the defendant's conduct in procuring the deed. *Harkey v. Harkey*, 1 Iredell's Eq. Rep. 394. Where both parties to a suit in chancery claimed what they were not entitled to, and each had succeeded as to a part of the matters in litigation between them. Held, that neither was entitled to costs as against the other. *Crippen v. Heermance*, 9 Paige, 211. Where the mortgagees was proceeding, upon a statute foreclosure, to sell the mortgaged premises for a much larger sum than was actually due on the mortgage, and the mortgagor filed a bill in chancery to restrain such sale, without having tendered, or offered, to pay what was legally and equitably due, the court refused to allow costs to either party as against the other. *Veatch v. Brownell*, 8 Paige, 212. Where there was a good demurrer for informality, which the court would allow to be amended, on the complainant's paying costs, and the defendant obtained a dismissal of the bill on a demurrer *ore tenus*, upon which, if alone, he would have to pay costs. No costs were given to either party. *Gove v. Pettis*, 4 Sand. Ch. Rep. 403. See *Waterman's American Chancery Digest*, tit. Costs.

[3] In the case of *Thorpe v. Freer*, which is here cited, the conditions of

his solicitor : (e) so, where a title was not clear on the abstract as delivered before bill filed, (f) or the vendor has refused to furnish necessary evidence in support of the title, (although the purchaser's requisitions embraced unnecessary evidence.) (g) [1]

So, the dismissal of the vendor's bill has been without costs, in cases where the dismissal was merely on the ground of his own *laches* in applying to the court, (h) or of the title being merely doubtful, (i) or of the general inaccuracy of the transactions relied on as constituting the contract, (k) or upon a ground of defence which the purchaser did not resort to until after the institution of the suit : (l) so, where a purchaser had, in the first instance, by his acts, waived the time for completion, and had gone on for some time inducing the vendor to incur expenses to perfect his title, and suddenly, upon discovering that vacant possession could not be given according to stipulation, declined to complete : (m) so, according to Sir E.

(e) See *Fenton v. Browne*, 14 Ves. 144, 150; *Dakin v. Cope*, 2 Russ. 175.

(f) *Anon. v. Collinge*, 3 Ves. & B. 143, n.; *Wilson v. Clapham*, 1 Jac. & W. 63.

(g) *Newall v. Smith*, 1 Jac. & W. 263.

(h) *Guest v. Homfray*, 5 Ves. 824.

(i) *White v. Foljambe*, 11 Ves. 337, 352; *Wilcox v. Bellaers*, Tarn. & Russ. 491.

(k) *Marquis of Townsend v. Stangroom*, 6 Ves. see 341.

(l) *Winch v. Winchester*, 1 Ves. & B. 380; and see 3 Y. & C. 517.

(m) *Nokes v. Lord Kilmorey*, 1 De G. & S. 444; and see *Deverell v. Lord Bolton*, 18 Ves. 505, 514; *supra*, p. 203.

sale stipulated that the purchaser should be allowed 5 *per cent.* on the deposit, if a title could not be made, but did not contain any other stipulation as to interest; after a decree in a bill by the seller for a specific performance, upon a motion to vary the minutes, by making the interest payable on the purchase-money 5 *per cent.*, the vice chancellor was of opinion that the general rule must prevail, and that the minutes of the decree were correct, confining the interest to 4 *per cent.*, and gave the purchaser his costs of opposing the motion.

[1] In this case, the Master reported that the abstract delivered by the vendor, before the filing of the bill, was sufficient, but he found that the purchaser required certain evidence in support of the abstract, some of which was necessary, but not furnished, and some not necessary; held, that both of the parties were in the wrong; and that upon the vendor's bill, no costs ought to be given on either side.

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*Sugden*, "if, after a bill filed for specific performance, the plaintiff, in pursuance of a power in the instrument, determines the contract, the bill will be dismissed without costs :"(n) so, the court has, by way of compromise, refused to fix the vendor with costs, he on his part consenting to give up his legal right of action under the agreement.(o)

[\*543]

\*So, a purchaser obtaining a decree for specific performance, has been refused his costs, on the ground of the inadequacy of the consideration :(p) so, where a purchaser's bill for the performance of a contract alleged to arise out of correspondence, was dismissed on the ground of the language being equivocal and not clearly amounting to an agreement, costs were refused :(q) so, also, on the ground of the defendant having in his answer alleged fraud and circumvention, which he failed to prove,(r) or having set up a false defence which the plaintiff has been obliged to disprove :(s) so, if the purchaser elect to have his bill dismissed, upon its appearing that the vendor cannot make a title, the present practice seems to be to dismiss the bill without costs ;(t) unless, perhaps,(u) his bill alleges that the vendor cannot make a title.(w)

And it has been held that, if a bill is correctly filed on the authority of a reported decision, there being no authorities in conflict with it, and such decision is reversed, the plaintiff may thereupon, on motion, dismiss his bill without costs.(x)

Cases where, in contravention of general rule, successful litigant is made to pay costs.

As to the 4th class of cases.—It not unfrequently happens that the party obtaining a decree has been clearly in the wrong, during all or a part only of the litigation ; and

(n) Sug. 661, referring to *Western v. Perrin*, 3 Ves. & B. 197.

(o) *Buzlon v. Lister*, 3 Atk. 387; and see 2 De G. & S. 346.

(p) *Burrowes v. Lock*, 10 Ves. 470.

(q) *Stratford v. Bosworth*, 2 Ves. & B. 348 ; and see 6 Ves. 341.

(r) *Thomas v. Phillipps*, 11 Jur. 80, V. C. K. B.

(s) *Field v. Churchill*, 4 Jur. 739, C.

(t) *Maldon v. Fyson*, 9 Beav. 347.

(u) See Sug. 822, n. (e.)

(w) *Nicloson v. Wordsworth*, 2 Sw. 365.

(x) *Robinson v. Rosher*, 1 Y. & C. C. C. 7; see also, as to mutual mistake, *Broughton v. Lashmar*, 5 Myl. & Cr. 136.

if so, he must, as a general rule, pay all or a proportionate part(y) of the costs of the suit: *e. g.*, in an exceptional case, where the plaintiff obtained a decree not in accordance with the prayer of his bill;(z)[1] he was made to pay the costs of the suit; so, "if a purchaser file \*a bill insisting that the vendor cannot make a title, he must pay the costs, whether he accept or refuse the title:"(a) so, if a purchaser, being a plaintiff and aware of objections to the title, require a reference to the Master, and, on the Master reporting against the title, agree to waive the objections, he must pay the costs of the unnecessary investigation:(b) so if, prior to the filing of the vendor's bill, the contract was resisted merely on the ground of want of title, and no title was shown before bill filed, the plaintiff, although he obtained a decree, will have to pay the costs up to the time when he showed a title;(c)[2] and this, although the purchaser, by his answer, unsuccessfully insist on the alleged illegality or abandonment of the contract;(d)[3] or even the general costs of the suit,(e) except

[\*544]

(y) See *Farrow v. Rees*, 4 Beav. 25.

(z) *Mortimer v. Orchard*, 2 Ves. jun. 243.

(a) Sug. 822, citing *Nicloson v. Wordsworth*, 2 Sw. 365, but with a query.

(b) *Bennett v. Fowler*, 2 Beav. 302.

(c) *Wilson v. Allen*, 1 Jac. & W. 623; Sug. 826.

(d) *Smith v. Leigh*, Sug. 824; but the purchaser will not be allowed the extra costs occasioned by this unsuccessful defence, *S. C.*

(e) *Knight v. Harden*, Beames on Costs, 38; *Townsend v. Champenowne*, 3 Y. & Coll. 528.

[1] In this case, a parol agreement with two persons, had been in part performed. The plaintiff's witness proved an agreement different from that set up by the bill, and the defendants stated an agreement different from both. The chancellor thought, in strictness, the bill ought to be dismissed; but as there had been an execution of some agreement between the parties, and there were two defendants who prove the agreement set up by their answers he decreed a specific performance of the agreement, confessed by the answer.

[2] But the court will not let this rule operate as a trap for the seller; and if further abstracts are furnished after the bill is filed, will inquire whether they are material. So as to evidence. But with regard to evidence, much depends upon the fact whether further evidence was required by the purchaser.

[3] In this case, the Master found that the seller could make a title in

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such costs as have been occasioned by improper contentions or objections made or taken by the defendant in the course of the suit: (f) so, where a vendor, when before the Master, abandoned the ground on which he had previously relied, but established his title on another ground, and the Master reported generally in favor of the title, the purchaser was allowed the costs of the reference and the several applications to the court. (g) But the rule will not prevail where the purchaser, by resisting the contract on grounds other than of title, (h) [1] or by his improper

(f) *S. C.*

(g) *Fielder v. Higginson*, 3 Ves. & B. 142; *Harrison v. Coppard*, 2 Cox, 318.

(h) *Croome v. Lediard*, 2 Myl. & K. 293; *Scoones v. Morrell*, 1 Beav. 261; *Taylor v. Brown*, 2 Beav. 180; but see Sug. 828.

February 1820, which was subsequently to filing the bill. To the Master's report, the purchaser took an exception, and elected to have a case sent to law, which the vice chancellor granted as a matter of course. The point was decided against him; and, upon the cause coming on for further directions, the exception was overruled, and a specific performance decreed, and the purchaser was to be paid the costs, up to February 1820, other than the costs of his insisting, by his answer, on the illegality or abandonment of the agreement, and the purchaser was to pay the costs of the subsequent proceedings before the Master, and the costs of the case to the Common Pleas, and the plaintiff was to pay the costs of the hearing.

[1] In this case, the purchaser, the defendant, contended that he was not bound to perform the contract for the purchase of the seller's estate, because the seller, the plaintiff, could not make a title to another estate, which he had agreed to sell to him, the defendant; but the court overruled the objection, and referred it to the Master to inquire as to the title to the first estate, without reference to the time when it was made. The Master reported in favor of the title, and the purchaser insisted upon the costs of the inquiry as to the title, as there was no report that a good title could be made, before the filing of the bill; but it was held that the defendant was liable to all the costs incident to the suit, having, by his conduct, rendered the suit necessary. The suit, and the consequential inquiry, were rendered necessary by the nature of the defendant's contention as to the construction of the agreement; and, as he had failed in his defence, which turned upon the construction of the agreement, and not upon a question of title, he must, the court held, pay the costs of investigating the title in the Master's office.

conduct,(i)[1] of claim,(k) has occasioned \*the litigation; Ch. XV III.  
 or where, insisting on other objections, he has not accepted the vendor's offer to procure evidence which, if produced, would have perfected the title:(l) so, if a purchaser file a bill for specific performance with an abatement of purchase-money, the question of abatement being the only one in dispute, if he fail upon this point the decree for specific performance will give costs against him:(m) so, if the successful litigant introduce upon the pleadings unfounded allegations affecting the character(n) of his opponent, he will have to pay the costs thereby occasioned.(o) But where the court, merely on the ground of the personal hardship of the case as against the defendant, refuses to enforce specific performance, and dismisses the bill, it will not make him pay the plaintiff's costs.(p)

Where a purchaser sets up a defence which prevents the plaintiff from obtaining the usual reference of title on motion, and fails to establish it, he may be at once directed to pay costs up to and inclusive of the hearing, without regard to the result of the reference.(q)

Where the defendant submits to the whole demand of the plaintiff, and to pay costs, he may at once stop all further proceedings;(r) and, if the question of liability to costs be the only one remaining in dispute, the proper

Costs, when defendant submits to plaintiff's demand.

(i) *Oxenden v. Lord Falmouth*, cited Sug. 826.

(k) *Wyvill v. Bishop of Exeter*, 1 Price, 292.

(l) *Long v. Collier*, 4 Russ. 269.

(m) *Fewster v. Turner*, 6 Jur. 144, V. C. W.; *White v. Cuddon*, 8 Cl. & Fin. 766.

(n) See 7 Ha. 444.

(o) *Wright v. Howard*, 1 Sim. & St. see 205; *Bower v. Cooper*, 2 Ha. 408; see *Thomas v. Phillips*, 11 Jur. 80, V. C. K. B.

(p) *Wedgwood v. Adams*, 8 Beav. 103.

(q) *Hyde v. Dallaway*, 4 Beav. 606.

(r) *Dawer v. Earl of Portarlington*, 2 Ph. 30; *Sivell v. Abraham*, 8 Beav. 598, and cases there cited; *Sawyer v. Mills*, 1 Mac. & G. 390.

[1] In the case here cited, the court held that the suit became necessary by the improper conduct of the purchaser; and therefore, the vice chancellor, although he had allowed, as a fact that the title to a part of the estate was not shown until after the filing of the bill, yet held, that as the purchasers misconduct rendered the suit necessary, he must pay all the costs.

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course, it appears, is to apply to the court by petition;(s) and where a plaintiff omitted so to do, but brought the \*cause to a hearing, the court refused him any costs subsequent to the time at which his original demand had been submitted to.(t) It has, however, been unwillingly held by V. C. K. Bruce, that this course cannot, without the defendant's consent, be adopted before answer : inasmuch as he has a right to put in his answer, and read it on the question of costs at the hearing ;(u) and in a later case(w) his honor refused a similar application by a plaintiff after answer ; but merely on the ground of the novelty of the proceeding.

When defendant disclaiming is entitled to costs.

In a late case,(x) it was laid down by Sir J. Wigram, V. C., as a general rule, that where a defendant so disclaims as to show that he had no interest in the property *when the bill was filed*, he is entitled to his costs ;(y) but where he is properly brought before the court in respect of an interest at the *time the bill was filed*, and then says, "I now abandon my interest," it is a question of discretion with the court either to order the plaintiff to pay the defendant's costs or not, with reference to the circumstances which may have rendered the suit necessary or proper.(z)

Possession—how far important.

As a general rule, a purchaser is less favored on the question of costs when he has taken possession of the estate before the title is made out; but this does not apply to cases where, according to the contract, possession is to be taken before a title is shown ; or where it is taken at the instance of the vendor.(a)[1] A purchaser who,

(s) *Sivell v. Abraham*, 8 Beav. 598; *Winter v. Vizitelli*, 36 Leg. Ob. 53, V. C. E.; *Price v. Corporation of Penzance*, 4 Ha. 506.

(t) *Sivell v. Abraham*, *ubi supra*; and see *Sentance v. Porter*, 13 Jur. 980, V. C. W.; and *Woodward v. Miller*, 16 L. J., N. S., V. C. K. B. 16.

(u) *Langham v. Great Northern Railway Company*, 1 De G. & S. 505.

(w) *M'Naughten v. Hasker*, 12 Jur. 956.

(x) *Gabriel v. Sturgis*, 5 Ha. 101.

(y) See *Glover v. Rogers*, 11 Jur. 1000, R.

(z) See *Ohrly v. Jenkins*, 11 Jur. 1001, V. C. K. B.

(a) See *Vancouver v. Bliss*, 11 Ves. 458; see 464.

[1] Where difficulties arise in making out a good title, the purchaser should not take possession of the estate until every obstacle is removed.



for many years, retained possession without payment, and Ch. XVIII.  
 \*refused either to vacate the contract or accept the title,  
 was fixed with the costs of a suit by the vendor, although  
 the title was ascertained to be defective.(b)

Where the court has actually dismissed a purchaser's Deposit, not  
set-off  
against  
costs.  
 bill with costs, it will not, on a subsequent application,  
 allow him to set off against them the deposit paid to the  
 vendor, but will leave him to his legal right ;(c) but the  
 court, as we have seen, has refused to give costs unless  
 the vendor would return the deposit.(d)

Where a defendant, a purchaser asked for a case to be Costs of case  
sent to law.  
 sent to a court of law, which was granted, and the opinion  
 of the judges was against him, but ultimately the bill was  
 dismissed with costs upon another ground, he was allowed  
 his costs at law as well as in equity ;(e) but, in other  
 cases, the costs of, what may be termed, collateral litigation,  
 have either been refused, or have been thrown upon  
 the party failing therein, although held entitled to the  
 general costs of the suit.(f) It would appear that, as a  
 general rule, such costs are not included in a mere order  
 for payment of the costs of the suit.(g)

And it is laid down by Sir E. Sugden, as a general rule, Costs of  
action at  
law.  
 "that either party resorting to law, where the equity is  
 against him, will be fixed with the costs of the action ;"(h)  
 but the *prima facie* right of the other party to such costs

(b) *King v. King*, 1 Myl. & K. 442.

(c) *Williams v. Edwards*, 2 Sim. 84.

(d) *Gee v. Pearse*, 2 De G. & S. 346.

(e) *Forbes v. Peacock*, 12 Sim. 528 ; the vice-chancellor's decision on the  
 general merits was reversed by Lord Lyndhurst, 1 Ph. 717.

(f) See *Townsend v. Champerdowne*, 3 Y. & Col. see 528 ; *Smith v.*  
*Leigh*, V. C. 1821, cited Sug. 824.

(g) *Salkeld v. Johnson*, 1 Mac. & G. 533.

(h) Sug. 829 ; *Staines v. Morris*, Ves. & B. 16.

Purchasers frequently take this step, under an impression that it gives them  
 an advantage over the vendor ; but this is a false notion ; such a mea-  
 sure would, in many cases, be deemed an acceptance of the title, or would  
 at least be a ground to leave it to a jury to consider whether the party had  
 not taken possession with an intention to waive all objections.

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No interest  
payable on  
costs re-  
funded.

may be lost by his neglecting to resort to equity so soon as the action is commenced at law.(i)[1]

\*Lastly, we may remark, that where either party has received costs under an order or decree which is subsequently reversed on appeal, he will not, in repaying such costs, be compelled to pay interest upon them.(k)

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## \*CHAPTER XIX.

## AS TO SALES BY THE COURT OF CHANCERY.

1. *As to the time for conduct of, and manner of the sale.*

2. *As to the rights and liabilities of the highest bidder, after the sale, but before confirmation of the master's report;—and as to opening biddings.*

3. *As to confirming the master's report—and as to the purchaser's rights and liabilities after confirmation.*

4. *As to the investigation of title;—payment and application of purchase-money;—possession:—and preparation and execution of the conveyance.*

5. *As to the purchaser's rights after completion.*

6. *As to the practice where the purchaser fails to complete.*

Sales by the  
court are  
usually by

(1.) AN estate, when sold by the court, is usually sold by public auction; [2] the court will, however, at once

(i) *Grovel v Hugell*, 3 Russ. see 433.

(k) *Small v. Attwood*, 3 Y. & C. 131; and see 2 Ph. 469.

[1] In the case here cited, a purchaser objected to a title upon an equitable ground, and the seller brought an action against him, and he allowed judgment to against him by default, and a writ of inquiry to be executed and damages to be assessed by a jury, and then filed a bill for an injunction, and to have the contract delivered up, and his deposit returned, although he obtained a decree with costs, yet he was refused his costs at law, because they were chiefly incurred by his own negligence: he ought to have filed his bill as soon as the action was commenced against him.

[2] Where property consists of separate and distinct parcels, which can

accept an advantageous offer actually made for the property ; (a) or, if circumstances render such a course expedient, Chap. XIX.  
 auction, but may be by

(a) See *Dowle v. Lucy*, 4 Ha. 311. The master's report approving of such a sale should be confirmed on special petition; *Bailey v. Todd*, 1 Beav. 95.

be enjoyed by the owners thereof separately, without diminishing their value, it is the duty of the officer who sells the same under a decree of the court, to sell in parcels, except in very special cases. *American Ins. Co. v. Oakley*, 9 Paige, 259; vide 1 Johns. Ch. Rep. 505. Where the property to be sold consists of several known lots, tracts, or parcels, the 138th rule of the New York Court of Chancery requires that the master shall expose such lots, tracts, or parcels, separately for sale. And the last clause of that rule was only intended to provide for special cases; where it is evident that the several parcels of land, from their peculiar location in reference to each other, will be more valuable if owned by one person, than if owned by different individuals in severalty; or where, in consequence of some prior incumbrance upon the parcels, purchasers will not be likely to bid upon a portion only of the property, subject to such a general incumbrance. *Ib.* The sheriff, or the master, who is directed to sell property under a judgment or decree, to pay the debt due to the plaintiff, should expose it for sale at such a time, and under such circumstances as to cause it to bring the best price without injury to the party entitled to the proceeds of the sale, by delaying the payment of his debt. *McGowan v. Sandford*, 9 Paige, 290. Where a master in chancery, in violation of his duty, is proceeding to sell property under a decree at an improper time, and when such sale will necessarily produce a sacrifice of the property, as during the raging of a pestilence, or where there is a threatened invasion which would deter bidders from attending the sale to bid upon the property, the court, under whose decree the sale is to be made, may stay the sale. But the court has no legal right to interfere for the relief of a particular individual, by arbitrarily suspending the ordinary operation of the laws for the collection of debts, to meet his particular case. *Ib.*

The fact that the value of the property was depressed in consequence of the general derangement of the finances, and affidavits of the defendants, and others, of their belief that the politics and finances of the country would be settled by the congress which was then in session, so as to greatly increase the value of property, were held to be insufficient to justify the court in ordering a suspension of the sale of the mortgaged premises under a decree of foreclosure. *Ib.* Where the master sells property under a decree in chancery, at an improper time, or in such a manner as to prevent a fair competition, or if, for any other cause, it is inequitable that such sale should be permitted to stand, the proper remedy of the party aggrieved, is by a summary application to the court, in the suit in which the decree was made, to set aside the sale, upon such terms and conditions as may be just, so as to protect the rights of the purchaser, as well as of the other parties interested in such sale. *Brown et als. v. Frost, et als.*, 10 Paige's Rep. 243; see also 13 Wen. Rep. 224; 2 Paige, 339; 8

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private contract.

When sale may be made in administration suit.

dient, will authorize the master generally to sell by private contract.(b)[1]

[\*550]

Where the decree in an administration suit directs the master to inquire and state what real estate passed by the will, and that the estates which he shall find to have passed be sold with his approbation, he may, after having "informed himself what estates passed, proceed to sell them, without making any previous report upon the preliminary inquiry :(c) but, where an infant is interested in the real estate, it seems doubtful whether the court will direct a sale until the accounts have been taken and the cause has been heard on further directions.(d)[2]

(b) See Dan. Ch. P. by H. 1216.

(c) *Dykes v. Taylor*, 16 Sim. 563.

(d) See *Baillie v. Jackson*, 10 Sim. 167, where Sir L. Shadwell, V. C., refused to insert a direction for sale in the decree; but, in Sir E. Sugden's opinion, there is no variable rule upon the subject; see *Lynch v. Joyce*, 3 Dru. & W. 349.

Ib. 349; 9 Ib. 259. See American Ch. Dig. by Waterman, vol. 3, pp. 10, 11, 12.

[1] Where it is for the interest of the parties, the court will depart from its usual course, and allow of the property being disposed of by private contract. Where, however, there has been a decree for sale before the master, in the ordinary form, the parties will not be at liberty to depart from that form, without an order to warrant it; and it seems, that if an estate directed to be sold before a master, is sold by private contract, or in any other manner, contrary to the order of the court, and not actually conveyed to the purchaser, the court will not take notice of the sale, but will direct the estate to be sold before the master according to the decree.

[2] The New York Revised Statutes, vol. 2, p. 194, s. 176, provide, that any infant seised of any real estate, or entitled to any term for years, in any lands, may, by his next friend, or by his guardian, apply to the court for the sale or disposition of such property. Whenever it shall appear that a disposition of any part of the real estate of such infant, or his interest in any term for years, is necessary and proper either for his support and maintenance, or for his education; or that the interest of the infant requires, or will be substantially promoted by such disposition, on account of any part of his said property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or for any other peculiar reasons or circumstances, the court may order the letting thereof for a term of years, or other disposition of the same to be made by such guardian or guardians so appointed, in such manner, and with such restrictions as shall be deemed expedient. But no real estate or term for years can be sold, leased, or disposed of, contrary to the provisions of any last will, or of any conveyance, by which such estate or term was devised

It has recently been determined by V. C. Shadwell and V. C. Knight Bruce, that the court may sell the real estate of a testator for payment of his debts under the 3 and 4 Will. IV. c. 104, although the suit be instituted by a person interested under the will instead of by a creditor.<sup>(e)</sup>

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Sale may be made under 3 and 4 Will. IV. c. 104, in suit by person claiming under will.

With respect to suits commenced by claim, under the orders of April, 1850, it is directed,<sup>(f)</sup> that "under every order whereby any property is to be sold with the approbation of the master, the same is to be sold to the best

Sale in suits commenced by claim.

<sup>(e)</sup> *Price v. Price*, 15 Sim. 484; *Rodney v. Rodney*, 16 Sim. 307; *Dinning v. Henderson*, 2 Coll. 330.

<sup>(f)</sup> No. 17.

or granted to the infant. It is a sufficient ground to authorize a sale of an infant's property, that it is held in common with adults, and that the value thereof is small in comparison with the expense of a partition suit, to which it must otherwise be subjected. The statute authorizes the next friend, or guardian of the infant, to make the application to the court for leave to sell. The general guardian of the infant, if he have any, and if not, the infant himself, if of the age of eighteen years or upwards, or some relative or friend, if he is under that age, may apply. The application must be made by petition, stating the age and residence of the infant, the situation and value of his real and personal estate, the situation, value, and income of the real estate proposed to be sold, and the particular reasons which render a sale necessary or proper; and praying that a guardian may be appointed to sell the same. The petition must also state the name and residence of the person proposed as guardian, the relationship, if any, which he bears to the infant, and the security proposed to be given. The petition must be sworn to. Where several infants are interested in the same premises as tenants in common, the application in behalf of all must be joined in the same petition, although they may have several general guardians; and, there must be but one reference to ascertain the propriety of a sale as to all. See Barb. Ch. Pract., vol. 2, p. 210.

A decree of strict foreclosure cannot be made against an infant, without giving him a day to show cause. He will be allowed six months after he comes of age, to show cause against the decree. It is to be observed, however, that, in such a case, the only cause which can be shown by the defendant, is error in the decree; and, it has been held that he may not unravel the account, nor is he so much as entitled to redeem the mortgage, by paying what is due. The clause giving the infant a day to show cause against a decree of foreclosure after coming of age, must be inserted in the order for making the decree absolute, as well as in the original decree; and, in *Williamson v. Gordon*, 19 Ves. 114, an order was made upon motion for varying a decree, in which the clause had been omitted, by its insertion. *Ib.*, p. 190.

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purchaser that can be got for the same, to be allowed by the master; *wherein*(*g*) all proper parties are to join, as the master shall direct."

Who may  
bid.

As a general rule, no party to the suit ought to bid for the estate without the previous permission of the court;(*h*) and the party permitted to bid will not be allowed to conduct the sale;(*i*)[1] and where, without such permission, the party conducting the sale purchased, and under a feigned name, the court, even after the purchase had been confirmed, ordered the estate to be put up again at the price for which he had bought it; and if there should be no higher bidding, he was to be held to his bargain.(*k*)

[\*551] \*A residuary legatee,(*l*) or tenant for life, or owner of a reversionary interest in the estate, may, (subject to the above restriction,) purchase on a sale by the court; and Lord Eldon, although disapproving of the rule, has referred to its existence as free from doubt.(*m*) In a late case, an application by an executor in an administration suit for leave to bid, was refused.(*n*)

Who con-  
ducts sale.

In general, the plaintiff conducts the sale;(*o*) in which case his solicitor is considered, as between the vendors and the purchaser, to be the agent of all the parties to the suit:(*p*) the master, however, may, if he consider it for

(*g*) *Quære*, in what? The sale, *semble*.

(*h*) *Elworthy v. Billing*, 10 Sim. 98; Sug. 66; but see *Wilson v. Greenwood*, 10 Sim. 101, n.

(*i*) See *Domville v. Berrington*, 2 You. & C. Ex. 723.

(*k*) *Sidny v. Ranger*, 12 Sim. 118; such an order may be brought under the review of the House of Lords by a purchaser, although he is not a party to the cause; *Bailey v. Maule*, 7 Cl. & Fin. 121, n.

(*l*) *Hooper v. Goodwin*, G. Coop. 95.

(*m*) See *Williams v. Attenborough*, Turn. & R. 76.

(*n*) *Geldard v. Randall*, 9 Jur. 1085.

(*o*) See Dan. Ch. P. by H. 1193.

(*p*) *Dalby v. Pullen*, 1 Russ. & Myl. 296.

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[1] Although a residuary legatee or tenant for life, or the owner of a reversionary interest, may become the purchaser at a sale under the order of the court, it is necessary, if he be a party to the record, that he should have a previous order to warrant his being admitted as a bidder at the sale; and the court will not permit a party having such an order to conduct the sale. See 1 Barb. Ch. Pract., 528, and cases.

the benefit of the parties to the suit, give the conduct of the sale to a person other than the plaintiff.(q) Ochap XIX.

Where a suit is instituted to carry into execution the trusts of an instrument which directs a sale upon the occurrence of a specified event, and some of the parties interested in the proceeds of sale are not *sui juris*, the court has no power to direct a sale before the occurrence of such event:(r) however injurious delay may be to the property.(s) Court, when executing trust, cannot anticipate time thereby fixed for sale.

Assuming the court to have properly directed a sale, the same usually takes place before the master:(t) but he may, if he shall think it for the benefit of the parties interested, order the estate to be sold in the country, at such place and by such person as he shall think fit.(u)[1] It is stated, in a work of reputation, that a London auctioneer \*is never appointed for a country sale;(w) but the rule is not invariable.(x) Sale may be in town or country. [\*552]

The general rules, to which we have before adverted, respecting the relative duties of intended vendors and purchasers prior to the contract, apply as well to sales under an order of the court as to ordinary sales; *e. g.*, puffing cannot be supported in the one case more than in the other.(y) Relative duties of vendor and purchasers prior to the sale.

The particulars and conditions are prepared by the solicitor of the party conducting the sale;(z) and, if of a special nature, are usually settled by counsel, as in other Particulars and conditions—preparation, allowance, and nature thereof.

(q) *Dixon v. Pyner*, 7 Ha. 331.

(r) *Blacklow v. Laws*, 2 Ha. 40.

(s) *Johnstone v. Baber*, 8 Beav. 233.

(t) Dan. Ch. P. by H. 1193.

(u) 75th order of April, 1828.

(w) Dan. Ch. P. by H. 1194.

(x) In *Bracey v. Earl of Scarborough*, V. C. W., July, 1849, estates were sold at Bristol by Messrs. Farebrother & Co.

(y) Sug. 64.

(z) Dan. Ch. P. by H. 1195.

[1] In *Ferguson v. Franklin*, 6 Munf. Rep. 305, held, if the sale is advertised to be on the premises, and it be sold within eighty yards of the dwelling house, and within view, it will not be set aside, although it was not, in fact, on the premises, but fifteen or twenty yards from the boundary line; the sale otherwise being regular, and no fraud appearing.

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cases; they must, however, be finally allowed by the master: the remarks already made,(a) upon particulars and conditions, are generally applicable as well to sales before a master as to ordinary sales; it is not, however, usual, on sales by the court, to insert the common stipulation as to the best bidder being the purchaser, or as to the estate being put up again and re-sold in the event of there being any dispute as to the last or highest bidding,(b) nor is it usual to require the payment of a deposit, except upon the sale of standing timber separately from the estate;(c)[1], or to insert any stipulation that the purchaser shall sign

(a) Ch. IV.

(b) 3 Dav. Conv. 92.

(c) Dan. Ch. P. by H. 1197.

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[1] It is not usual, in sales of estates under the decrees of the court, to require the purchaser to make any deposit. It is, however, sometimes done; and it seems that, in cases where timber upon an estate is sold separately from the estate itself, the practice is to require a deposit; the conditions of a sale usually providing that the purchaser of each lot shall sign an agreement for the performance of the conditions, and pay one-third of the amount of the purchase-money. It may be mentioned that, in England, where timber is sold under the direction of the court, the conditions of sale, besides providing that the purchaser of each lot shall sign an agreement for the performance of the conditions, and pay one-third of the amount of the purchase-money, in cash, or Bank of England notes, at the sale, generally stipulates that he shall give to the person appointed to sell, bills drawn upon and accepted by some other person or persons, for the remainder of the purchase-money, such bills to be approved of by the auctioneer, and made payable in London, at particular times, in the conditions of sale expressed, and that no purchaser shall be permitted to enter or cut, until such bills are given. The conditions, however, vary according to the custom of the particular part of the country in which the estate, where the timber is growing is situated; and, in some cases, instead of the foregoing condition, it is provided that the purchaser, after making a deposit of 10*l.* per cent., upon the amount of his purchase-money, shall, within a month, give security, to be approved by the master, or enter into recognizances, for the payment of the remainder. If the conditions are framed in this manner, the highest bidder in each lot signs an agreement, at the foot of the particulars of sale, whereby he agrees to become the purchaser of the lot, subject to the conditions; he then pays the deposit, and gives a bond, or enters into recognizances for payment of the residue, such bond or recognizances having been previously settled by the master.



an agreement to complete the purchase ;(d) but he is, independently of stipulation, bound to sign his name, description, and place of abode, after the amount of his bidding, on a copy of the particulars.(e) If a reserved bidding is considered desirable, the insertion of a condition to that effect must be authorized by the court ; and the proper course is, to apply by motion on petition(f) for \*such a direction, when an order will be made for the master to fix a reserved bidding, if he shall think fit.(g)[1]

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[\*553]

In a modern case, where a deposit was deemed desirable, the court refused to sanction its payment to the master's clerk, but allowed it to be paid to the solicitors of a defendant in the cause, they undertaking by counsel to account for it, and the defendant submitting to be bound by any future order which the court might make respecting it.(h)

Payment of deposit—arrangement respecting.

There are two advertisements of sale ; each of which must be allowed by the master, and inserted in the Gazette, and should also be inserted in other London, and, (if the estate be in the country,) provincial newspapers ; the time of sale is stated only in the second, or peremptory advertisement, having been previously fixed by the master with the approbation of the parties to the cause ; the warrant to attend him for that purpose should be served on the solicitors of all the parties.(i)

Advertisements of sale.

When the estate is sold by the master, the sum of 5*l*., if the entire purchase-money (whether the estate be sold

Expenses of sale.

(d) See 3 Dav. Conv. 92.

(e) Dan. Ch. P. by H. 1197.

(f) See *Brooker v. Collier*, 3 Russ. 369.

(g) Dan Ch. P. by H. 1194 ; *Shaw v. Simpson*, cited 1 Jac. & W. 392 ; as to form of order, see *Jervoise v. Clarke*, *ibid*, 391.

(h) *Lyon v. Colvill*, 6 Jur. 680, V. C. K. B.

(i) See Dan. Ch. P. by H. 1195.

[1] In acting upon an order for a reserved bidding, a correct valuation of the estate should be made by a skilful surveyor, setting out in schedules the amount of the rental, and the estimated value of the whole estate, and of each lot separately, and the sum at which the same ought to be sold together, and also at what stated sum each lot ought to be sold ; and there should be a statement of facts comprising the valuation of the estate, and an affidavit of the surveyor in support of the valuation.

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in one lot or several lots) does not exceed 2000*l.*, or, if it exceed that sum, then five shilling on every 100*l.*, is payable by such party as the master shall direct; (*k*) if the estate is sold in the country, the auctioneer is usually allowed, not a per-centage on the purchase-money, but a fixed sum, the amount of which is previously settled with him by the vendor's solicitor with the approval of the master. (*l*)

Highest bidding by a person incompetent, or of insufficient means—  
[\*554] effect of.

If an incompetent person, (as a lunatic,) is declared the highest bidder, the court cannot hold the next bidder to \*his bidding, or even allow him to stand as purchaser with the consent of the parties to the cause, (*m*) [1] in a recent case, where the offer of the highest bidder was rejected, under the idea that he was of insufficient means, and the next bidder was declared the purchaser, the court did not treat the sale as void, but seemed to consider that the highest bidder should have moved that he, instead of the other, might be declared the purchaser. (*n*)

Bidding after estate bought in.

Where a purchaser made an offer after the auctioneer had declared the amount of the reserved bidding, it was held that this was an offer respecting which a special application to the court was necessary. (*o*)

Resale of lots remaining unsold.

Any lots remaining unsold may be again advertised for sale. (*p*)

(2.) *As to the rights and liabilities of the highest bidder, after the sale but before confirmation of the Master's report ;—and as to opening biddings.*

Highest bidder not

The fact of being, and being declared, the highest bid-

(*k*) See Schedule to Orders of 21st December, 1833; *Re Allen's Charities*, 2 Myl. & K. 627.

(*l*) Dan. Ch. P. by H. 1194.

(*m*) Sug. 72; *Blackbeard v. Lindigren*, 1 Cox, 205; *sed quare*, whether the court might not treat the case as one of an offer to purchase by private contract.

(*n*) *Hughes v. Lipscombe*, 6 Ha. 142.

(*o*) *Dowle v. Lucy*, 4 Ha. 311.

(*p*) Sug. 66.

[1] Nor even where all the parties in the cause, desired it, as they apprehended the estate would not sell for so much to any other person. But the estate was ordered to be re-sold generally.

der, does not at once invest such bidder with the character of purchaser; [1] nor does he assume that character until the master's report is made and confirmed as hereinafter mentioned: and it has been held by Sir E. Sugden, C., that the master has a discretion, and is not absolutely bound to accept the highest bidder: (q) a loss by fire, even after the report, but before confirmation, falls therefore on the vendors: (r) and a motion before confirmation, that the best bidder shall complete, and pay his purchase-money, by a certain day, will be refused: (s) but if the interest \*purchased be in its own nature determinable—e. g., a life estate,—it seems that the report will be confirmed, and he must pay the purchase-money, although the event, upon which the interest determines, occur before confirmation: (t) so, if the report be confirmed, he will, in the case of a life estate, be entitled to the intermediate income. (u)

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the purchaser until Master's report confirmed—his rights in the interim.

[\*555]

The death of the purchaser before confirmation of the report, does not, however, vacate the sale, even although he never signed an agreement; sales by the court, not being within the statute of frauds; (w) [2] but the contract

Death of purchaser before confirmation—contract cannot be enforced against representative.

(q) *In re Costello's*, 2 J. & L. 244, 246, 249.

(r) *Ex parte Minor*, 11 Ves. 559.

(s) *Anon.* 2 Ves. jun. 335.

(t) *Anson v. Tugood*, 1 Jac. & W. 639; and see *Vesey v. Elwood*, 2 Con. & L. 47; 3 Dru. & W. 74, overruling *Vincent v. Going*, cited *ibid.* p. 75.

(u) *Anson v. Tugood*, 1 Jac. & W. 637.

(w) See *Att.-Gen. v. Day*, 1 Ves. 221.

[1] In ordinary sales by auction, or by private agreement, the contract is complete when the agreement is signed; but a different rule prevails in sales before a master; in such cases, the purchaser is not considered as entitled to the benefit of his contract till the master's report of the purchaser's bidding, is absolutely confirmed.

[2] On the ground that there is no danger in such a transaction, of either fraud or perjury, a sale before a master under the decree of a court of equity, will be carried into execution, although the purchaser did not subscribe any agreement. The judgment of the court, in confirming the purchase, takes it out of the statute. And the sale, after confirmation, will be enforced against the representatives of the purchaser, although not signed. The court however, cannot enforce the contract against them without a suit; but it will allow the heir to have the benefit of the contract, upon payment of the purchase-money, leaving it to him to compel the executors to re-imburse him, if they have assets. And where a per-

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dies without suit.

Subsale at a profit before confirmation—is for the benefit of the estate.

Nisi confirmation biddings may be opened on sufficient advance in price.

cannot be enforced against his representatives without suit : (x) and it is the practice in such a case not to serve the heir with notice of an application to open the biddings. (y)

If, before the report is confirmed absolutely, the purchaser re-sell at a profit, the sub-purchaser becomes the purchaser under the court at the advanced price : (z) in a late case, where the first purchaser had received the advance in price and had absconded, the court directed the property to be re-sold ; reserving the question whether, if it should not produce the sum offered by the sub-purchaser, he should not be answerable to the court for the difference ; and reserving all questions of liability in the original purchaser. (a)

Until the report is confirmed absolutely, the expectant purchaser may lose his bargain by the court opening, (as it is termed,) the biddings ; that is, directing a re-sale, on the application of a person willing to give a higher price for the property ; and this, although he be interested in

(x) *Lord v. Lord*, 1 Sim. 503.

(y) *Templer v. Sweet*, 8 Beav. 464 ; Lord Langdale's private opinion seems to have been that the heir should be served.

(z) *Hodder v. Ruffin*, Taml. 341.

(a) *Holroyd v. Wyatt*, 2 Coll. 329.

son bought under the decree for another who died without having adopted the contract, although an order nisi to confirm the purchase in his name, had been obtained, the court refused to order the executors of the purchaser to pay the purchase-money, and the heir declining the purchase, the order nisi was set aside, and a re-sale ordered, and the consideration as to any deficiency that might arise on the re-sale, and by whom the costs of it were to be repaid, were reserved ; it was held that the executors, in a purchase by their testator from the court could not be compelled by the heir to pay for the estate without filing a bill.

A release, entered by verbal direction, in open court, is valid, and satisfies the statute. *Boykin's Dev. v. Smith*, 3 Munf. Rep. 102. Sales of estates at auction, are within the New York Statute, and to pass the estate, a note or memorandum in writing is required. *Simonds v. Callin*, 2 Caines' Rep. 61 ; *Jackson v. Callin*, 2 Johns. Rep. 248 ; S. C. affirmed on error, 8 Johns. Rep. 406. In the case of *Hobby v. Finch*, Kirby's Rep. 14, particulars of sale of lands, advertised to be sold at auction, signed by the vendor, were held to be a sufficient memorandum in writing, within the statute.

"the proceeds of sale:(b) or were present at the sale;(c)[1] but, in the last case, the court will regard the application with some jealousy, and will require a larger advance than under ordinary circumstances:(d) and they may be opened a second time(e) on the application of the same person.(f)

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The sufficiency of the advance is considered with reference to the entire purchase-money; including the price of timber, if valued separately from the estate:(g) as to what constitutes sufficiency, no definite rule seems to exist; but about ten *per cent.* seems to be the usual advance on small sums;(h) the court has accepted an advance of 60*l.* upon 430*l.*,(i) of 80*l.* upon 775*l.*,(k) of 50*l.* on 395*l.*,(l) and of 365*l.* on 7300*l.*;(m) in a late case, the court refused 300*l.* but accepted 350*l.* on 3500*l.*;(n) and it seems that, whatever be its rate, an advance of less amount than 40*l.* will be refused;(o) but an advance of 105*l.*, upon the aggregate price of nine lots sold to the same purchaser, has been accepted.(p) In the case of

What advance is sufficient for the purpose.

(b) *Hooper v. Goodwin*, G. Coop. 95.

(c) *Thornhill v. Thornhill*, 2 Jac. & W. 347, overruling earlier cases there cited; see Sug. 88, n.

(d) *Tyndale v. Warre*, Jac. 525, 526; *Lefroy v. Lefroy*, 2 Russ. 606; *Shallcross v. Hibbertson*, 1 C. P. Coop. N. R. 380.

(e) *Scott v. Nesbit*, 3 Bro. C. C. 475; *Walond v. Walond*, 8 Beav. 352.

(f) *Preston v. Barker*, 16 Ves. 140; Sug. 85.

(g) *Bates v. Bonnor*, 6 Sim. 380.

(h) See Sug. 85; Dan. Ch. P. by H. 1210; and 2 Coll. 537.

(i) *Bourn v. Bourn*, 13 Sim. 189.

(k) *Connell v. Hardie*, 3 You. & C. 677.

(l) *Hughes v. Lipscombe*, 6 Ha. 142.

(m) *Domville v. Berrington*, 2 You. & C. Ex. 723; and see *Walond v. Walond*, 8 Beav. 352.

(n) *Holroyd v. Wyatt*, 2 Coll. 537.

(o) See *Farlow v. Weildon*, 4 Madd. 460; *Gilbert v. Wetherell*, there cited; *Brookfield v. Bradley*, 1 Sim. & St. 23; *Ward v. Cooke*, 9 Sim. 87; in *Templer v. Sweet*, 8 Beav. 464, the advance was in fact 50*l.* instead of 30*l.*; see Reg. Lib. B. 1844, fo. 1224.

(p) *Humphries v. Roberts*, 6 Jur. 680, V. C. K. B.; *vide infra*, p. 558, n.

[1] The person who is desirous of opening the biddings having been present at the sale, and having bid, is no objection to their being opened, although a greater advance may, on that account, be required. For it is material that the applicant is entitled to a part of the produce of the estates.

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property of fluctuating \*value, as a colliery, (q) (if in work or recently worked,) (r) the court is generally unwilling to risk a re-sale, and has refused an advance of 1150*l.* upon 8850*l.* (s) but in a recent case, where the property was held upon lives, the court evaded the difficulty by accepting an advance of 350*l.* on 5500*l.*, on condition that the party opening should be bound by his offer if no better bidding *could be enforced.* (t)

When opening biddings on any of several lots taken by the same purchaser discharges him as to the residue.

Where several lots are purchased by the same person, and the biddings are opened as to any of them, he may give up those which he subsequently purchased, on satisfying the court that he bought them in consequence of having purchased the prior lot; (u) and a like indulgence would probably be granted if the biddings in respect of a subsequent lot being opened, he could satisfy the court that he bought the prior lot with a view of purchasing such subsequent lot; (w) and a person seeking to open biddings on some only out of several lots bought by the same purchaser, will therefore be required to take such other lots at their original price, if the purchaser shall decline them, and they shall not fetch so much on a resale. (x)

Course of proceeding

The person wishing to open a bidding [1] must, at his

(q) *Williams v. Attenborough*, Turn. & Russ. 70.

(r) *Jeffreys v. Smith*, 1 C. P. Coop. N. R. 381.

(s) *Williams v. Attenborough*, Turn. & Russ. 70.

(t) *Walond v. Walond*, 8 Beav. 352; see *Wren v. Kirton*, 8 Ves. 502.

(u) *Price v. Price*, and *Fielder v. Fielder*, 1 Sim. & St. 386.

(w) See Sug. 89; *Ex parte Tilsley*, 4 Madd. 227, n.; *et vide supra*, 507, as to connecting lots.

(x) *Bates v. Bonnor*, 6 Sim. 380.

[1] It seems to be almost a matter of course, in England, to open the biddings on a master's sale before the confirmation of his report, upon the offer of a reasonable advance on the amount bid, and the payment of the costs and expenses of the purchaser. And the mere advance of price is sufficient to open the biddings, and they may be opened more than once. In this country, it is otherwise. In the case of *Duncan v. Dodd*, 2 Paige's Rep. 100, it was decided that the biddings at a master's sale will not be opened, except in very special cases; and then it will not be done unless the purchaser is fully and liberally indemnified for all damages, costs and expenses, to which he has been subjected. In that case the premises were struck off for \$2025, no conveyance having been executed, and the peti-

own expense, apply for leave, by motion, notice of which must be given to the parties in the cause, and the pur- Chap. XIX.  
to open  
biddings.

tioner offering an advance of 50 per cent. on the purchase for the benefit of infant defendants. The chancellor ordered a re-sale upon sufficient security to the satisfaction of the master, that the premises should actually produce an advance of 50 per cent. upon a re-sale, or a deposit with the master of the advance offered. And this upon the ground that the property sold was the sole dependence of two infant children, and had been sacrificed either through the misapprehension or negligence of their mother and step-father. The chancellor expressly stating, that, "if the defendants were adults, and the property had been sacrificed by their own negligence or inattention, he would not disturb the sale. Mr. Justice Nelson, in *Collier v. Whipple*, 13 Wend. Rep. 224, also takes the same ground. After observing that in England, the mere advance offered would be sufficient before the confirmation of the report to open the biddings, he remarks that such is not our practice, and that the reasons for the difference are sound and conclusive.

By the opening of the biddings, the purchaser is discharged from his purchase entirely; and if he has paid the deposit, or any part of the purchase-money into court, he will be entitled to have it paid to him. If he is the purchaser of more lots than one, and the biddings are ordered to be opened as to some of the lots which were first purchased, the purchaser will be allowed to have the biddings opened, and to be discharged from his purchase, as to all the lots purchased by him. But the purchaser, in order to entitle himself to such an indulgence, should appear upon the motion to open the biddings, and produce an affidavit that he had bid for the subsequent lots in consequence of his having been declared the best bidder for the first lot. See Barb. Ch. Pr. vol. 1, p. 537, 538.

Fraud or misconduct in the purchaser, or fraudulent negligence in any other person connected with the sale, as the agent of the mortgagor, or of persons interested as judgment creditors, and also surprise created by the conduct of the purchaser will induce the court to open the biddings. So where a memorandum not authorized by the master was read at a sale, describing the dimensions of the dwelling house sold, and which turned out to be incorrect by several feet, the sale was vacated. A master's sale on a mortgage foreclosure will also be opened, and a re-sale ordered where judgment creditors are prevented from attending and bidding at the sale, in consequence of an impression received from the master that the sale will not take place on the day appointed; although there is no collusion between the master and the purchaser; provided the judgment creditors offer to make an advance at the re-sale upon the former bid, to an amount sufficient to cover their demands. In the case of *Gordon v. Sims*, 2 M'Cord's Ch. Rep. 159, a sale was set aside because the land was knocked off to the purchaser prematurely by a mistake of the auctioneer, who did not hear a higher bid. A re-sale may also be ordered on the application of other parties, where the purchaser neglects to comply with the terms of sale within a reasonable time. *Jackson v. Edwards*, 7 Paige, 387. Where property has been bid in by trustees for themselves under peculiar circumstances, the court will, at the instance of creditors, order it to be put up to

Chap. XIX. chaser,(y) but not to the heir of a purchaser dying before confirmation of the master's report;(z) he cannot in one

(y) Sug. 84; Dan. Ch. P. by H. 1214.

(z) *Templer v. Sweet*, 8 Beav. 464.

sale again at the price bid by the trustees. *Brinckerhoff v. Brown*, 4 John. Ch. Rep. 675. In Maryland, if it is shown either before or after a sale has been ratified, that there has been any injurious mistake, misrepresentation or fraud, the biddings will be opened, the reported sale rejected, or the order of ratification rescinded, and the property again sent into the market and resold. *Anderson v. Foulke*, 2 Har. & Gill, 346. Where the property has been sacrificed by the mistake or neglect of the master to comply with the legal requirements on the sale; or by his having improperly put up for sale several lots together, which should have been sold separately, the parties injured are entitled to a re-sale, or to such other relief as can be given without doing injustice to a *bona fide* purchaser of the premises at the sale. *Amer. Ins. Co. v. Oakley*, 9 Paige, 259. So where the master had written instructions from the complainant's solicitor not to sell the premises for a less sum than \$2600, the amount of the debt and costs; but, through ignorance of his duty, the premises were sold for \$1000 less to purchasers who were informed of the instructions at the time of the sale, and before they paid their bid, the court ordered a re-sale of the property. *Ragna v. Rea*, 2 Paige, 339. And the purchasers in that case having taken possession and made improvements, after being informed by the master that the facts would be submitted to the court—without waiting for the confirmation of the report of sale—it was held that they were not entitled to indemnify therefor. And if a master sells at an improper time, or in such a manner as to prevent a fair competition, or if from any other cause, it would be inequitable to permit the sale to stand, a re-sale will be ordered upon such terms and conditions as may be just; so as to protect the rights of the purchaser as well as of the parties interested in the sale. So a re-sale will be ordered where mortgaged premises have been sold greatly below their value, and bought in by the mortgagee, if the mortgagor or those standing in his place, have been misled by the mortgagee, or seen by a third person, in reference to the foreclosure of the mortgage, and, in consequence thereof, do not attend the sale. *Tripp v. Cook*, 26 Wend. 143. The court has even allowed a decree, obtained by default, to be opened after enrolment, and after a sale had been made by a master, under the same in a case where the complainant himself became the purchaser, and had not parted with his interest therein to a *bona fide* purchaser or mortgagee, to enable the defendant to make a defence upon the merits. *Millsbaugh v. M' Bride*, 7 Paige's Rep. 509. Mere inadequacy of price unattended by other circumstances, is not enough to induce the court to open a sale, unless the inadequacy is so great as to be evidence of fraud or unfairness in the sale. So, where property is regularly advertised and fairly sold by a master, a sale will not be set aside, and a re-sale directed for the benefit of parties interested in the proceeds of the sale, to protect them against the consequences of their own negligence, where they are adults and were competent to protect their own rights on the sale. See Barb. Ch. Pr. vol. 1, p. 537, 538, 539, 540, and authorities.



motion include lots sold to separate purchasers : (a) if his offer be \*accepted, the order will, in general, be made on condition that he pay, as a deposit, the amount of his advance ; (b) and this he must do at his own expense ; (c) however, in a recent case, where an advance of 7000*l.* was offered upon 27,000*l.*, Lord Langdale allowed the biddings to be opened on payment into court of only 3400*l.* ; (d) he must also pay to the first purchaser interest at four *per cent.*, on such part of his purchase-money as may have laid dead ; (e) and his costs, including any costs which he himself paid on opening former biddings ; (f) and also, it would seem, (although no special directions will, in general, be given,) (g) his or his agent's costs of a journey to the estate ; (h) and where property which had been sold in several lots was directed to be resold in a single lot, the court, under the special circumstances, directed that the person opening the biddings should pay to the purchasers their expenses of surveying the estate. (i)

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Deposit  
required.First pur-  
chaser to be  
paid interest  
and costs.

If the person obtaining the order neglect to draw it up and pay the deposit, any other person may, upon notice to him, move to open the biddings. (k)

Biddings  
may be re-  
opened on  
neglect to  
pay in de-  
posit.

Re-sale.

The order being obtained and drawn up, and the deposit paid, the estate will then be resold, and the proceedings on the resale will be similar to those on the original sale ; (l) it appears doubtful whether the estate can be re-

(q) *Goodall v. Pickford*, 6 Sim. 379. In *Humphries v. Roberts*, 6 Jur. 680, the nine lots appear to have been bought by the same purchaser ; see Registrar's Minute Book, Trin. T. 1842, fol. 258, where the case is entered as *Jones v. Williams*.

(b) See *Anon.* 6 Ves. 513.

(c) Sug. 84.

(d) *Manners v. Furze*, 17 L. J., N. S. Ch., 485, R.

(e) *Re Birch*, Sug. 85.

(f) *Bales v. Bonnor*, 6 Sim. 382.

(g) See *Anon.* 2 Ves. jun. 286.

(h) S. C. ; and see note to *Furlow v. Weildon*, 4 Madd. 461.

(i) *Watts v. Martin*, 4 Bro. C. C. 113, Belt's edition.

(k) *Gibbons v. Howell*, 4 Madd. 52.

(l) Dan. Ch. P. by H. 1215.

Chap. XIX. allotted without a special order(*m*) made on special reasons.(*n*)

First purchaser discharged by order opening biddings. Person opening biddings if outbid at re-sale is *prima facie* discharged.

\*The first purchaser is entirely discharged by the order opening the biddings.(*o*)

When entitled to costs.

If, upon a resale, the person opening the biddings be outbid, he is, in the absence of any special agreement with the court,(*p*) discharged from his offer,(*q*) and may reclaim his deposit, but without costs,(*r*) although the price of the estate has been more than doubled by the re-sale;(s) but such costs,(*t*) and also interest at 4*l. per cent.* on the deposit,(*u*) have been allowed where the biddings have been opened merely for the benefit of the parties interested in the proceeds of the estate.

Opening biddings in fictitious name.

A person opening biddings in a fictitious name, will be compelled to take the estate at the price at which he opened them,(*w*) if, on a resale, no better offer is made and can be enforced.(*x*)

(3.) *As to confirming the master's report of the purchase ; and as to the purchaser's rights and liabilities after confirmation.*

Course of proceeding by purchaser to confirm master's report.

The person who eventually is the highest bidder, and who wishes to complete his purchase must, at his own expense, procure, file, take an office copy of, and apply to the court, (either by motion or petition, of course, at the rolls,) to confirm the master's report of his being the best

(*m*) *Ibid.* ; and compare Sug. 87.

(*n*) *Ward v. Cooke*, 9 Sim. 87; and see *Humphries v. Roberts*, 6 Jur. 680, *supra*, p. 558.

(*o*) See Dan. Ch. P. by H. 1212.

(*p*) See *Walond v. Walond*, 8 Bea. 352.

(*q*) See *S. C.*, and *Williams v. Attenborough*, Turn. & R. 77.

(*r*) *Rigby v. M'Namara*, 6 Ves. 466; *Trefusis v. Clinton*, 1 Ves. & B. 361.

(*s*) *Earl Macclesfield v. Blake*, 8 Ves. 214.

(*t*) *S. C.*: *Owen v. Foulks*, 9 Ves. 348; *West v. Vincent*, 12 Ves. 6; *Chapman v. Fowler*, 3 Ha. 577.

(*u*) *Filder v. Bellingham*, 1 Coll. 526; *Gravenor v. Miles*, 8 Jur. 838, V. C. K. B.

(*w*) *Molesworth v. Opie*, 1 Dick. 289.

(*x*) Sug. 88.

bidder;(y)[1] whereupon an order *nisi* is made, confirming the report, unless cause be shown within a specified \*time after service; he must, then, at his own expense, procure an office copy of such order, and, at the expiration of the time therein limited, (but not before, even with consent,(z) apply to the court for an order confirming the report absolutely; which order is made, of course, on an affidavit of service of the order *nisi*, and certificate of no cause having been shown.(a) No notice of either application is required,(b) but the second order can be made only on a seal day.(c) He should not procure the second order while under notice of an application to open the biddings;(d) but the order, if so obtained, must be discharged before the biddings can be opened.(e)

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[\*560]

After the report is confirmed absolutely, the purchaser becomes the owner of the estate, subject to payment of the purchase-money, and is not liable to have the biddings opened on the mere ground of advance in price,(f) or of negligence, surprise, &c. on the part of the ven-

After confirmation, purchaser prima facie entitled to estate subject to payment of price.

(y) Dan. Ch. P. by H. 1199.

(z) *Vernon v. Thellusson*, 10 Beav. 452.

(a) Dan. Ch. P. by H. 1199; Sug. 70.

(b) *Ibid.*

(c) *Robertson v. Skellon*, 10 Beav. 199; this is an exception from the general practice as to motions, of course.

(d) *Vansittart v. Collier*, 2 Sim. & St. 608; *Watson v. Brickwood*, there cited.

(e) *Vansittart v. James*, 1 C. P. Coop. N. R. 379.

(f) *Mirice v. Bishop of Durham*, 11 Ves. 57; *White v. Wilson*, 14 Ves. 151; *Fergus, Executor of, v. Gore*, 1 Sch. & Lef. 350.

[1] After the master's report has been filed, the complainant's solicitor enters an order, of course, that the sale may be confirmed; unless cause is shown against it within eight days; and if no exceptions are filed, and served within that time, the order will become absolute, of course, without notice or further order; unless there is an application, in the meantime, to set aside the sale. And the former owner of the equity of redemption cannot prevent the confirmation of the report by tendering or offering to pay the amount of the decree, with interest and costs. Until the report is confirmed, the court will not interfere to compel a delivery of the possession of the premises to the purchaser; whether such purchaser be the mortgagee himself or a stranger to the suit. And until such confirmation of the report, any person interested in the sale may apply to the court for a re-sale. See Barb. Ch. Pr. vol. 1, p. 529.

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dors, *(g)* or of mistake on the part of an intended bidder; *(h)* but only on the ground of fraud or misconduct in the purchaser, or of his fiduciary character, or of some fraudulent negligence in another person—*e. g.*, the agent for sale—of which it is against conscience that the purchaser should take advantage; *(i)* he is also, liable to any loss which may happen in connection with the estate; as, in a recent, case the expense of making good damages caused to \*adjoining property by the fall of the houses which he had purchased. *(k)*

[\*561]

May move to pay in his purchase-money, or to discharge incumbrances.

He may apply by motion, on notice, for leave to pay his purchase-money into the bank, and to be let into possession; or, if incumbrances appear in the report, or, (*semble*) if not so appearing, the same are known to exist, and all parties to the suit are *sui juris* and agree to their discharge, for leave to pay them off out of the purchase-money, and to pay in the balance; *(l)* the payment, however, must be an entire payment, although the lot be sold to joint purchasers; *(m)* where interest is payable, the same must be paid in full without deducting the income tax. *(n)*

Substitution of purchaser allowed, on what terms.

The court will, either before or after the report is confirmed, discharge the purchaser and substitute any other person, *(o)* upon his paying in the entire purchase-money, and upon an affidavit that there is no under-bargain; *(p)* and such an order has been made where the first purchaser, after confirmation of the report, had agreed in writing to sell the property, and had since died, and his heir was abroad; *(q)* and, where the same motion asks for

*(g)* See 14 Ves. 153.

*(h)* *Anon.* 1 Ves. jun. 453.

*(i)* See *Morris v. Bishop of Durham*, 11 Ves. 57; and, as to fraud, see cases cited, Sug. 87.

*(k)* *Skellon v. Robertson*, 14 Jur. 323.

*(l)* Dan. Ch. P. by H. 1202; Sug. 72.

*(m)* *Darkin v. Marye*, 1 Anst. 22.

*(n)* *Holroyd v. Wyatt*, 1 De. G. & S. 125; *Dawson v. Dawson*, 11 Jur. 984, V. C. E.; *Humble v. Humble*, 12 Beav. 43.

*(o)* See Sug. 66.

*(p)* *Rigby Macnamara*, 6 Ves. 515; *Vale v. Davenport*, 6 Ves. 615; and see *Miller v. Smith*, 6 Ha. 609.

*(q)* *Pearce v. Pearce*, 7 Sim. 138.

such substitution and for leave to pay the money and be let into possession, since no additional costs are incurred by the parties to the cause than would have been incurred on the usual motion to pay in purchase-money, no costs will be given.(r)

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“(2.) *As to the investigation of the title ;—payment and application of purchase-money ;—possession ;—and preparation and execution of the conveyance.* [562]

Delivery of the abstract may, if necessary, be compelled by an order obtained on motion;(s) and, if dissatisfied with the title shown thereby, the purchaser may procure an order that the title be referred to the master; upon which reference the proceedings will be similar to those in a suit for specific performance;(t) contrary to the rule which prevails in ordinary sales, the court will compel the purchaser to take an equitable title;(u) but only where the legal estate is outstanding without any claim of interest on the part of the person in whom it is vested;(w) nor will it compel him to take a doubtful equitable title;(x) nor, perhaps, where there is a material error in the decree, to wait until the same is rectified.(y) In a late case, where a purchaser had accepted the title and paid in his purchase-money, he was discharged from the contract upon a deed being discovered which showed that the plaintiffs could not make a title to more than a moiety of the estate;(z) but a purchaser who, having discovered a supposed defect in the title, buys in the interest of the party who alone could take advantage of it, will not be allowed the benefit of the general rule as to doubtful titles.(a)

Abstract—  
and title.

(r) *Christian v. Chambers*, 4 Ha. 307.

(s) *Dan. Ch. P.* by H. 1168.

(t) *Ibid.* 1200.

(u) 14 Sim. 312; and see Sug. 525.

(w) *Caddock v. Piper*, 14 Sim. see p. 312; and see 3 Ves. 23.

(x) *Marlow v. Smith*, 2 P. Wms. 201.

(y) *Leckmere v. Brasier*, 2 Jac. & W. 287; but see *Sherwood v. Beveridge*, 13 Jur. 1042, V. C. K. B.

(z) *Ward v. Trathen*, 14 Sim. 82; S. C. 8 Jur. 303.

(a) *Sheppard v. Doolan*, 3 Dru. & W. 1.

## Chap. XIX.

Costs of reference.

It is stated by Sir E. Sugden,<sup>(b)</sup> that, in every case, the purchaser is entitled to the costs of the motion for a \*reference of title, and to the costs of that reference; it appears, however, from a recent case,<sup>(c)</sup> that the decision upon which the above proposition was founded, is misreported; and that the court only held that the purchaser was not liable to *pay* costs, on the master reporting in favor of the title; if, however, the title were made out before the master, on grounds not appearing on the abstract, he would be entitled to receive costs.<sup>(d)</sup> If the title prove bad, the purchaser is entitled to receive his costs, charges and expenses, out of the fund in court (if any),<sup>(e)</sup> or, if there be none, from the plaintiff, who may recover them in the suit;<sup>(f)</sup> it is said to have been held by Sir J. Leach that, where exceptions are allowed to the master's report in favor of the title, the court will not thereupon direct that the purchaser be discharged and his costs be paid, but that some specific application must be made for the purpose.<sup>(g)</sup> And it appears that, where the title is decided to be bad, the purchaser must be actually discharged by order, before there can be a resale.<sup>(h)</sup>

Where the sale has taken place under circumstances which, in the case of an ordinary sale, would be a defence to a suit for specific performance, except with a variation, but would not be a ground for rescinding the contract, the court, as the property must be sold, is obliged to decide whether the sale is to be carried into effect, or the property is to be resold; but, so far as possible, the rules which regulate such cases between ordinary vendors and

(b) Sug. 76, citing *Camden v. Benson*, 1 Keen, 671.

(c) See *Flower v. Hartopp*, 8 Beav. 200.

(d) *Fielder v. Higginson*, 3 Ves. & B. 142; the purchase in which case seems to have been made under a decree; see 2 Sim. & St. 117.

(e) *Reynolds v. Blake*, 2 Sim. & St. 117; *Att.-Gen. v. Corporation of Newark*, 8 Sim. 71; *Calvert v. Godfrey*, 6 Beav. 97.

(f) *Berry v. Johnson*, 2 Y. & C. Ex. 564, 565; *Smith v. Nelson*, 2 Sim. & St. 557.

(g) *Hide v. Hide*, 1 C. P. Coop. N. R. 379.

(h) *Williams v. Wace*, *ibid.*

\*purchasers will be adapted to purchasers under orders of the court.(i) Chap. XIX.

Although the practice has varied,(k) it is now clearly the rule of the court, that, on a special case, as where the purchaser is entitled to relieve himself from paying interest, the court will receive the purchase-money on his application, without his accepting the title;(l) but the order will not be made except in a special case;(m) nor will it be extended so as to let him into possession;(n) and where a purchaser, without the authority of the court, enters into possession, although with the consent of the vendor's solicitor, he will be held to have accepted the title,(o) and will be at once ordered to pay in his purchase-money.(p)

Purchase-money may, under special circumstances, be paid in without accepting title.

When the purchase-money is paid into court, it will not, without the purchaser's consent, be applied in discharge of incumbrances, on the ground of his delay in preparing the draft conveyance;(q) it is, however, usual, upon paying in the money, expressly to ask that it may not be paid out again without notice to the purchaser; an order to which effect prevents the distribution of the fund without the purchaser's consent given in court, or upon his non-appearance and an affidavit of his having been served with a copy of the order for setting down the cause on further directions, or of the petition for distribution;(r) \*in a late case, Lord Langdale appears to have held that, although the estate was sold for payment of debts, the

As to its application and distribution.

[\*565]

(i) *Atvanley v. Kinnaird*, 2 Mac. & G. 1, 8.

(k) See Sug. 73; *Denning v. Henderson*, 1 De G. & S. 689; and *Rutter v. Merriott*, 10 Beav. 33.

(l) Per Lord Cottenham in *De Visme v. De Visme*, 1 Mac. & G. 344; *Hindle v. Dakins*, 1 C. P. Coop. N. R. 378; *Morris v. Bull*, 1 De G. & S. 691, n.

(m) *Ouseley v. Anstruther*, 11 Beav. 399.

(n) *Hutton v. Mansell*, 2 Beav. 260; *Rutter v. Marriott*, 10 Beav. 33; *Dempsey v. Dempsey*, 1 De G. & S. 691.

(o) *Wilding v. Andrews*, 1 C. P. Coop. N. R. 380.

(p) *S. C.*; and see *Anon.* cited Sug. 74.

(q) *Bevan v. Bevan*, 1 C. P. Coop. N. R. 381.

(r) *Dan. Ch. P.* by H. 1203.

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Where the estate is incumbered.

court ought not to distribute the fund until an effectual conveyance could be made to the purchaser.(s)

We may here observe that an incumbrancer consenting to a sale in an administration suit is entitled to be paid his principal, interest, and costs, out of the purchase-money, in priority to the costs of the plaintiff in the cause;(t) and, as a general rule, a decree for sale of an incumbered estate does not, of itself, alter the rights of the parties; so that where estates subject to numerous and complicated incumbrances, were sold by consent, it was held that to authorize payment of the costs of sale in the first place out of the general fund there should have been a special direction in the decree; and that, there being no such direction, the money arising from the sale of each estate ought to be treated as the estate itself would have been; and that the mortgagees ought to be paid their principal, interest, and costs, according to their respective priorities;(u) but where a first mortgagee with power of sale unnecessarily files a bill praying a sale, subsequent incumbrances, although they consent to the sale, are entitled to their costs out of the purchase-money, although it be insufficient to pay off the first charge.(w)

Purchaser's costs of appearing on petition for its distribution, when allowed.

[\*566]

If invested at purchaser's request, he takes the proceeds of investment if contract rescinded. Possession from what time pur-

If the purchaser, before completion, is served with a petition or motion for payment of the purchase-money out of court, he is entitled to his costs of appearing on the application, although he make no opposition.(x)

If the money has been invested on his application, he \*must, if the purchase is rescinded, take the stock, notwithstanding any variation in the funds.(y)

Where the conditions of sale are silent as to the time when he is to have possession, and as to interest upon the purchase-money, the rule of the court is, that he shall be

(s) *Heming v. Archer*, 9 Beav. 366; see and consider *Morris v. Clarkson*, 3 Sw. 558, and other cases cited in reporter's note, *et quære*.

(t) *Hempworth v. Heslop*, 3 Ha. 485; and see *Tipping v. Power*, 1 Ha. 405.

● (u) *Wild v. Lockhart*, 10 Beav. 320; and see *Aldridge v. Westbrook*, 5 Beav. 188.

(w) *Cooke v. Brown*, 4 Y. & C. 227.

(x) *Bamford v. Watts*, 2 Beav. 201.

(y) *Hodder v. Ruffin*, cited Sug. 89.



let into possession from the quarter-day preceding the confirmation absolute of the master's report of his being the purchaser, he paying his purchase-money into court before the following quarter-day;(z) although he may not pay his purchase-money into court until the quarter is nearly expired, yet he will not be liable to pay interest (a) unless the estate be a reversion, in which case interest is payable from the date of the purchase;(b) if he delay payment, he will take the rent only from the quarter-day preceding payment;(c) nor will he be allowed the rents from an earlier day on the ground of his money having lain idle;(d) where, as in the case of a colliery, the profits are ascertained monthly or weekly, he will be entitled to them from the commencement of the month or week (as the case may be) in which he pays his money;(e) and the same principle would, it is conceived, prevail where, as often happens with house property, the rents are paid at shorter intervals than a quarter; while on the other hand, if rents are reserved half-yearly, the purchaser would seem, on principle, to be entitled to them from the commencement of the current half, instead of quarter, year; on the purchase of a manor, fines on descent, are, for the purpose of the above rules, considered to accrue due on the death of the copyholder, and not on the admission of his heir or devisee.(f)

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chaser is  
entitled to.

\*On the purchase of a life interest in stock, the purchaser pays interest and takes the dividends from the day of sale:(g) on the purchase of a life annuity, secured by bond and payable quarterly, he must pay interest and take

[\*567]

On purchase of life interest or life annuity.

(z) *Maurice v. Wainewright*, C. P. Coop. N. R. 378.

(a) S. C.

(b) *Trefusis v. Lord Clinton*, 2 Sim. 359.

(c) Sug. 73.

(d) *Ibid.*; *Hindle v. Dakins*, 1 C. P. Coop. N. R. 378.

(e) *Wren v. Kirton*, 8 Ves. 502.

(f) *Garrick v. Lord Camden*, 2 Cox, 231; the marginal note is incorrect; it will be seen from the case that the admissions were after and not before the time fixed for completion; see *Earl Hardwicke v. Lord Sandys*, 12 M. & W. 761.

(g) *Anson v. Thogood*, 1 Jac. & W. 637.

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the annuity from the day on which he could first have confirmed the report.(*h*)

As to the abstract, &c.

The remarks already made(*i*) as to the abstract, searches for incumbrances, and matters arising between its delivery and the preparation of the conveyance, are generally applicable as well to sales by the court as to ordinary sales.

Conveyance—when to be settled by master.

The conveyance, if an infant be a necessary conveying party,(*k*) or if, although he be not a party, it will by statute have the effect of divesting his estate,(*l*) must be settled by the master; but, with this exception, it is usual to direct only that the draft be settled by the master in case the parties differ;(m) and, when the order is so worded, a purchaser going before the master pays his own costs, unless he can make out special grounds for exemption:(n) the practice before the master is similar to that in a suit for specific performance.(o)

Executor of lease entitled to indemnity from purchaser of leaseholds.

Upon the sale by the court of leaseholds of a testator, his executor, although he have not been in possession, is entitled to an indemnity from the purchaser against the rent and covenants.(p)

[\*568]

Purchaser may require concurrence of all necessary parties.

\*The purchaser may require the concurrence of all persons having a legal title to, or remedy against, the property, although parties to the suit;(q) except, perhaps, a dowress, whose dower is barred by a term or equitable jointure;(r) but cannot, it would seem, "if he acquire the legal estate, require, at the seller's expense, a release from equitable incumbrancers whose demands have been satis-

(*h*) *Twigg v. Fifield*, 13 Ves. 517.

(*i*) *Supra*, Ch. VIII., X., XI.

(*k*) *Calvert v. Godfrey*, 2 Beav. 267.

(*l*) *Cheese v. Cheese*, 15 L. J., N. S. 28, V. C. S.; *aliter*, if the infant be only interested in the proceeds of sale (*Richardson v. Ward*, 11 Beav. 378:); the consequent costs must be borne by the funds in Court; *Brown v. Lake*, 15 L. J., N. S., 34, V. C. K. B.

(*m*) Sug. 75.

(*n*) *Hodgson v. Shaw*; 11 Jur. 95, V. C. K. B.

(*o*) *Vide supra*, 586.

(*p*) *Cochrane v. Robinson*, 11 Sim. 378.

(*q*) See and consider *Craddock v. Piper*, 14 Sim. 310.

(*r*) *Vide supra*, pp. 251, 252.

fied by the court;”(s) nor does it, in fact, appear, that he can insist on the concurrence, even at his own expense, of parties having mere equitable interests and who are bound by the decree;(t) if the decree direct that all proper parties convey, and a party to the suit, whom the master considers a proper party to the conveyance, refuses to concur, the purchaser should move against the recusant party (and not against the plaintiffs) that he do convey:(u) it appears that a mortgagee, who has proved his debt, may be required to receive his money and to concur without the usual six month’s notice.(w)

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Who are such.

Party refusing may be ordered to convey.

Such an order will not be made against a married woman in respect of her real estate not settled to her separate use;(x) but will be made against an infant,(y) and if he refuse to execute, an attachment may issue against him.(x)

Against whom order will be made.

[\*569]

But the more usual course of proceeding, where a party to the suit refused to execute, has been to treat such party as a trustee within the 1 Will. IV. c. 60, and to obtain an order for some other person to convey under the act; and this course might have been adopted when the recusant

Party refusing may be declared a trustee.

(s) Sug. 75, citing *Keatinge v. Keatinge*, 6 Ir. Eq. Rep. 43; and *Webber v. Jones*, *ib.* 142.

(t) *Webber v. Jones*, *ubi supra*.

(u) *Stilkwell or Stilwell v. Mellersh*, 10 Sim. 367; 4 Myl. & Cr. 581.

(w) *Matson v. Swift*, 5 Jur. 645.

(x) *Jordan v. Jones*, 2 Ph. 170.

(y) As to conveyances on sales in creditor’s suits, see 1 Will. IV. c. 47, ss. 11 and 12, amended by 2 & 3 Vict. c. 60, and 11 & 12 Vict. c. 87; and see *Penny v. Pretor*, 9 Sim. 135; *Walker v. Aston*, 14 Sim. 87; *Heming v. Archer*, 8 Jur. 945; 7 Beav. 515; 8 Beav. 294: an infant tenant in tail may be ordered to convey, *Radcliffe v. Eccles*, 1 Keen, 130; *Penny v. Pretor*, *supra*: a suit by an equitable mortgagee praying a sale within the statute; and the infant heir of the mortgagor will be ordered to convey although the mortgagee is, with the permission of the court, the purchaser; and although, if the decree had been for foreclosure, the infant would have been allowed to show cause on coming of age; see *Scholefield v. Heafield*, 7 Sim. 669; 8 Sim. 470; *Redshaw v. Newbold*, 12 Jur. 833, V. C. K. B.; *Clinton v. Bernard*, 1 Dru. 287, *et vide supra*, p. 312; but see now the Trustee Act, 1850, sects. 29 and 30: *quare*, whether under the 1 Will. IV. c. 47, and the 3 & 4 Will. IV. c. 104, the Court can sell copyholds; see *Branch v. Browne*, 12 Jur. 768, V. C. K. B.

(z) *Thomas v. Gwynne*, 8 Beav. 312; and see *Re Beech*, 4 Madd. 128.

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party was a married woman, (a) infant, (b) lunatic, (c) or mere tenant for life: (d) and the mere decree directing a sale and all proper parties to convey, made the owner of the legal estate, if party to the suit, a trustee within the act: (e) and an order for a conveyance, or a vesting or releasing order having the effect of a conveyance, may now be obtained under the 13 & 14 Vict. c. 60. (f)

(5.) *As to the purchaser's rights after completion.*

Purchaser  
after con-  
veyance  
executed  
may claim  
the deeds.

Upon the execution of the conveyance the purchaser is, as a general rule, entitled to have the title deeds delivered to him; and an order for their delivery, if not provided for in the order for payment of the purchase-money, may be obtained on motion: (g) [1] on a sale in lots, in the ab-

(a) *Jordan v. Jones*, 2 Ph. 170; *Billing v. Webb*, 1 De G. & S. 716; and see *Jumpson v. Pitchers*, 1 Coll. 13; *Hood v. Hall*, 14 Jur. 127, V. C. W.

(b) *Walters v. Jackson*, 12 Sim. 278; *Warburton v. Vaughan*, 4 Y. & C. 247; *Thomas v. Gwynne*, 9 Beav. 275.

(c) *In re Blake*, 3 J. & L. 265.

(d) *In re Milfield*, 2 Ph. 254.

(e) See cases cited in last four notes; and *King v. Leach*, 2 Ha. 57; *Robinson v. Wood*, 5 Beav. 246; *Jackson v. Milfield*, 5 Ha. 538; *In re Blackwell*, 7 Jur. 9, V. C. E.; *Barfield v. Rogers*, 8 Jur. 229, C.

(f) Sects. 29 and 30.

(g) Dan. Ch. P. by H. 1204.

[1] The conveyance being executed, the purchaser is entitled to have the title deeds relating to the estate delivered up to him. A direction for the delivery of them, frequently forms part of the order, for payment of the purchase-money into court; if it does not, and the documents are in the master's office, an order that they may be delivered to him, may be obtained by the purchaser, upon motion. Where there are several lots, and the purchaser has not bought them all, the form of the order generally is, "that such of the title deeds, &c. as relate solely to the lot purchased, and also, such as relate to the same jointly with other lots of less value, be delivered to the purchaser, or to whom he shall appoint, he submitting to produce such last mentioned deeds and writings, on necessary occasions, and to enter into a covenant for that purpose, and to give attested copies thereof, when required, at the expense of the party requiring the same; but as to such title deeds as relate to the estate purchased jointly with other estates of greater value, he is to have attested copies thereof at the expense of the estate; and the persons entitled to such estates of greater value, are to execute to him the like covenants, to produce such deeds and writings, on necessary occasions; and in case any dispute shall arise between the parties touching the copies of any particular deeds, the said master, is to settle the same."

sence of special agreement, the purchaser of the largest lot is entitled to the deeds as against the purchaser of several lots of larger aggregate amount ;(h) if the purchaser, instead of applying to the court, bring an action at law against parties to the suit for a document to which he is entitled, he will be restrained by injunction :(i) where mortgagees, parties to the suit, consented to the sale, they were ordered to leave the deeds in the master's office, but it was directed that they should not be delivered to the purchaser without notice to the mortgagees.(j)

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The purchaser is also, in the absence of stipulation, entitled to attested copies and a covenant for the production of the originals of such documents of title as are not delivered to him :(k) it may however be remarked that, in *Dare v. Tucker*,(l) Lord Eldon qualified his order for delivery of attested copies by the expression, "unless you leave the originals, or make some other proposal in the master's office : " so that possibly, upon a sale by the court, a deposit of the deeds in the master's office might be sufficient to preclude the right to attested copies ; but such a deposit could probably not be enforced against a purchaser who had purchased to an amount exceeding that of any other purchaser, and the part (if any) remaining unsold.

As to attested copies.

Where the estate is sold in accordance with the decree, the court " will protect the purchaser against the parties to the suit, and all parties coming in under the decree ;"(m) and Sir E. Sugden considers it to be a general rule " that the purchaser shall not lose the benefit of his purchase by any irregularity in the proceedings in a cause :"(n) if, however, the court clearly exceed its jurisdiction, as if it assume to sell the real estate of infants \*upon the mere

Will be protected against all parties to the suit.

[\*571]

Unless Court exceed its jurisdiction.

(h) *Kinnard v. Christie*, cited Dan. Ch. P. by H. 1205.

(i) *Stubbs v. Sargon*, 4 Beav. 90.

(j) *Livesey v. Harding*, 1 Beav. 343, 346.

(k) As to the qualification of this right, *vide supra*, p. 316.

(l) 6 Ves. 460.

(m) Sug. 69.

(n) Sug. 67, and cases there cited ; Dan. Ch. P. by H. 1201 ; and see *Baker v. Sowter*, 10 Beav. 343.

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notion that a sale is beneficial, (o) or, as against *cestuis que trust* not *sui juris*, to anticipate, without special grounds, the time fixed by the author of the trust for the sale of the estate. (p) it is not clear that the purchaser would be protected by the decree; at any rate he will not be compelled to accept the title: and a purchaser is always bound to see that the sale is according to the decree; (q) although he is not bound to see that no more property is sold than will be sufficient for the purposes for which a sale was directed; (r) nor will he, it would seem, be affected by fraud in the proceedings of which he himself is innocent. (s) Of course, the decree is no protection against persons who ought to have been, but are not, parties to the suit. (t)

Allowed  
compensa-  
tion for mis-  
description  
of estate.

A purchaser, after conveyance, has been allowed compensation out of his purchase-money, on the ground of the rent of the estate having been overstated in the particulars. (u) [1]

(o) *Calvert v. Godfrey*, 6 Beav. 97; see *Peto v. Gardner*, 2 Y. & C. C. 312. See, as to special circumstances warranting a sale, *Garmstone v. Gaunt*, 1 Coll. 577; and see, as to the sale by the Court of charity lands, *Att.-Gen. v. Corporation of Newark*, 1 Ha. 395; *Att.-Gen. v. South Sea Company*, 4 Beav. 453, and cases cited: it seems doubtful whether the Court can direct a sale, upon petition under Sir S. Romilly's Act (52 Geo. III. c. 101); see *In re Parke's Charity*, 12 Jur. 1011; *In re Suir Island Charity*, 3 J. & Lat. 171.

(p) *Blacklow v. Laws*, 2 Ha. 40; *Johnstone v. Baber*, 8 Beav. 233.

(q) *Colclough v. Sterum*, 3 Bli. 181, 186, 188 *Lutwyck v. Winford*, 2 Bro. C. C. 248, 251.

(r) S. C.

(s) See Sug. 67; *Bowen v. Evans*, 1 J. & L. 178; 2 H. L. C. 257; see also, on the general subject, *Thornhill v. Glover*, 3 Dru. & W. 195.

(t) *Colclough v. Sterum*, 3 Bli. 181—186.

(u) *Cann v. Cann*, 3 Sim. 447.

[1] Where, by the terms of the master's sale of mortgaged premises under a decree, the property was to be sold free of incumbrances, and all taxes and assessments were to be paid out of the purchase-money, provided bills thereof were produced to the master before the completion of the sale; and it afterwards appeared that an assessment to a large amount against the property, for the opening and macadamizing the avenue through the same, had not in fact been confirmed by the corporation of the city at the time of the sale, although the work had been contracted for and completed more than three years before that time. Held, that purchasers

(6.) *As to the practice, when the purchaser fails to complete.*

Where the purchaser refuses or neglects to complete his purchase, and is supposed to be a responsible person, the

*Course to be adopted if purchaser*

at the sale, who had bid off the property, under the belief that such assessment had been confirmed; and that they would hold their lots discharged of the expense of opening such avenue, were not bound to take the property subject to the assessment for that improvement. *Post v. Leet*, 8 Paige, 337. Where some of the purchasers at a master's sale bid, upon the supposition that a large assessment, amounting to more than one-third of the value of the property, was to be paid out of the proceeds of the sale; and other persons who bid at the sale knew that the assessment was not confirmed, and bid accordingly. Held, that the purchasers were not entitled to hold their purchases, and to have the unconfirmed assessments paid out of the amount bid, unless the persons interested in the proceeds of the sale, consented thereto; but as the property had been purchased under a mistake, that there must be a re-sale. *Ib.* Where a master, who has neglected to file security for the faithful discharge of the duties of his office, assumes to act as such master, and sells mortgaged premises under a decree of foreclosure, and the report of the sale is confirmed by the court, the objection that the master had not given security, as required by law cannot be raised in a collateral suit, so as to affect the title of the purchaser at such sale. *Nicholl v. Nicholl*, 8 Paige, 340. The remedy of the party whose property is sold, if the objection to the master's authority to sell is valid, is by an application in the foreclosure suit, to have the sale set aside for irregularity. But such an objection, even if raised in the foreclosure suit, will not be listened to after a great lapse of time. *Ib.* Where property is regularly advertised, and fairly sold by a master, a sale will not be set aside, and a re-sale directed for the benefit of parties interested in the proceeds of the sale to protect them against the consequences of their own negligence, where they are adults, and competent to protect their own rights on the sale. *American Ins. Co. v. Oakley*, 9 Paige, 259. And where the sale is in the usual manner, and the purchase is made by a stranger to the suit, mere inadequacy of price is not a sufficient ground for depriving the vendee of the benefit of his purchase, unless the inadequacy is so great as to be evidence of fraud or unfairness in the sale. *Ib.* But the parties interested in the property to be sold have a right to expect that it will be put up and sold in the usual manner, and in a way to produce a fair compensation among the persons attending the sale, to bid upon the property. And where the property has been sacrificed by the neglect or mistake of the master, to comply with the legal requirements on such sale, or by his having improperly put up for sale several lots together, which should have been sold separately, the parties injured are entitled to a re-sale; or to such other relief as can be given without doing injustice to a *bona fide* purchaser of the premises at the sale. *Ib.* The recording of a master's deed, of premises sold by him under the decree in a foreclosure suit, is constructive notice to all subsequent purchasers

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refuses to  
complete.

If supposed  
to be irre-  
sponsible.

If supposed  
to be respon-  
sible.

\*solicitor of the party conducting the sale should procure the Master's report, and the orders confirming it *nisi* and absolutely; (*w*) notice of motion for the order absolute must be served on the purchaser: (*x*) if, however, the purchaser has obtained the order *nisi*, and neglects to obtain the second order, the same may be obtained by the vendors on motion, (*y*) which is of course, and if made specially will be refused with costs; (*z*) but can be made only on a seal day. (*a*) If the purchaser be supposed to be incompetent in point of means, the vendors may move, on notice, that he be discharged, and that the estate be resold; (*b*) [1] or, as is now the more usual and more eligible course, to obtain an order, not that the purchaser be discharged, but that the estate be resold, and that he may pay the expenses arising from his non-completion of the purchase, the expenses of the application to the court, and of the resale, and any deficiency in price on the resale. (*c*)

If the purchaser is responsible, the vendors may move that within a given time he pay his money into court; [2]

(*w*) See Dan. Ch. P. by H. 1205; Sug. 71.

(*x*) *Ibid.*

(*y*) *Chillingworth v. Chillingworth*, 1 Sim. 291; *Lidbetter v. Smith*, 5 Beav. 377; *Roberts v. Williams*, 2 Ha. 151.

(*z*) *Robertson v. Skellon*, 10 Beav. 197.

(*a*) *Ibid.* 199.

(*b*) *Hodder v. Ruffin*, 1 V. & B. 544; *Cunningham v. Williams*, 2 Anst. 344; Dan. Ch. P. by H. 1206; Sug. 71.

(*c*) *Harding v. Marding*, 4 Myl. & Cr. 514; *Saunders v. Gray*, *ibid.* 515; *Gray v. Gray*, 1 Beav. 199.

from any of the parties to the decree, that the rights which such parties had in, or the liens which they had upon the mortgaged premises, at the time of the decree, were cut off by the master's sale. *De Peyster v. Hildreth*, 2 Barb. Ch. Rep. 109. See Amer. Ch. Dig. by Waterman vol. 3, p. 10, 11.

[1] On a master's sale, which reserves to the master a right to consider the biddings open until the deposit is paid, no sale can be enforced where the purchaser refuses to pay the deposit or sign an acknowledgment; and no order for a re-sale is necessary, the master will go on, as if no sale had taken place. *Hewlett v. Davis*, 3 Edw. Ch. Rep. 338.

[2] Where land is sold by a master, under a decree of the court of chancery, the court will not compel the purchaser to complete his purchase when he will not obtain such an interest in the premises, and in the



if he appear on the motion he is *prima facie* entitled to have the title referred to the Master; and, if he do not appear, it seems to be requisite that the vendors shall have delivered the abstract, and procured the Master's report in favor of the title; (d) or that the purchaser shall have accepted the title: (e) where defendants to the \*suit who were entitled with the plaintiff to shares in the estate, purchased a part of it of which they were in possession, and the conditions precluded any objection to the title, they were ordered to pay in the *entire* purchase-money, although they claimed allowances for improvements and the estate was incumbered. (f)

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[\*573]

On the other hand, where the contract is inequitable, (g) or where to enforce it would be attended with great hardship, as in the case of a sudden and violent change in the money market, (h) or where the purchaser has by mistake given an unreasonable price for the estate, (i) [1] and is ex-

Purchaser, whether allowed to forfeit deposit and abandon contract.

(d) Dan. Ch. P. by H. 1207, and cases cited; and see *Bulmer v. Allison*, 8 Jur. 440, V. C. W.; 15 L. J., N. S., 11 Ch.

(e) *Rutter v. Marriott*, 10 Beav. 33.

(f) *Bulmer v. Allison*, 15 L. J., N. S., Ch. 11, L. C.

(g) Sug. 89.

(h) *Savile v. Savile*, 1 P. Wms. 745; *sed quare*.

(i) *Morshead v. Frederick*, cited, but with disapprobation, Sug. 90.

buildings thereon, as he had a right to suppose, from the terms of the sale, he was buying, when the property was struck off to him on his bid. *Seaman v. Hicks*, 8 Paige, 655. And where a master sells property, with buildings thereon, as and for a good title, if the corporation of the city or village in which the premises are situated, has a right to take the land for a street at some future time, without paying for the buildings, of which fact the purchaser was ignorant at the time of the sale, the court will not compel him to complete his purchase, although the probability of the exercise of such right, by the corporation, is very remote. *Ib.* Where, under a decree for foreclosure and sale, a purchaser refuses to perfect his purchase, and the complainant does not press him, the master should sell the property over again, and not let the complainant take it at the purchaser's bid, and receive a deed. *Thompson v. Dimond*, 3 Edw. Ch. Rep. 298. See Amer. Ch. Dig. by Waterman, vol. 3, p. 10, 11.

[1] In the case of *Morshead v. Frederick*, which is here referred to, it appeared that Smiths, the bankers, were tenants in possession of the house in question, for which they paid two rents, one a ground rent of 56*l.*, to the defendant, and the other an improved rent of 210*l.* to a third person. The house was directed to be sold under a decree; and the plaintiffs, by a broker, treated for the purchase of it, and employed him to value it. The

Chap. XIX. peditious in applying to the court, *(k)* he will, according to some authorities, be allowed to forfeit his deposit (if any,) and abandon the contract: but this will not be conceded on the mere ground of the price being excessive, *(l)* nor in the case of a person without authority buying the estate to prevent a sale at an undervalue; *(m)* nor, it is conceived, under an ordinary state of circumstances. [2]

*(k)* See *Price v. North*, 2 Y. & C. 620, 626.

*(l)* *In re Birch*, cited Sug. 89.

*(m)* *Nellhorpe v. Pennyman*, 14 Ves. 517.

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broker had an interview with the attorney concerned in the sale, who stated, that the rent payable for the house was the 56*l.*, and the broker valued the estate accordingly. A written agreement was not entered into, but the contract was approved of by the master, and the money paid into the bank. The purchasers then moved the court to rescind the contract, on the ground of mistake, and the broker proved that the purchasers had not informed him of the rent of 210*l.*; and that he was ignorant of the existence of it at the time he made his valuation: and the court ordered the purchase-money to be repaid, and rescinded the contract. "This however," says Sugden, "may be considered a strong case. It might be argued that the purchaser's only equity was their own negligence."

[2] There has been much discussion and diversity of opinion" says Kent, (2 Kent Com. 475) on the subject of rescinding, and of enforcing the specific performance of contracts, in the cases of partial failure of the consideration. In one case, Lord Kenyon observed, when sitting in chancery, that the court had gone great length in compelling parties to go on with purchases, contrary to their original agreement and intention; but he said a case might be made out sufficient to put an end to the whole contract, when the seller could not make a good title to part of the subject sold. In the case of the Cambridge wharf, the seller made title to all the estate but the wharf, and that part of the land, was the principal object of the buyer, in making the purchase, and the buyer who had contracted for the house and wharf, was compelled to complete the purchase without the wharf. But, as Lord Kenyon truly observed, that was a determination contrary to all justice and reason. There have been a number of hard cases in chancery, and in which performance has been enforced, though there was a material variance between the actual and supposed circumstances of the subject, and when those circumstances were wanting which were the strong inducement to the contract. These cases had gone to such extravagant lengths, that Lord Erskine declared he would not follow them, nor decree specific performance when the main inducement to the purchase had failed. In many cases however, where the title proves defective in part, or to an extent not very essential, specific performance will be decreed with a rateable reduction of the purchase-money, by way of compensation for the deficiency. The good sense and equity of the law on this subject, is, that if the defect of title, whether of lands, or chat-

tels, be so great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether. This is the principle alluded to by Pothier, and repeated by Lord Erskine and Lord Kenyon. In South Carolina, it has been held, that if the deficiency in the quantity of land, be so great as to defeat the object of the purchase, the vendee may rescind the bargain; and if the defects were not so great as to rescind the contract entirely, there might be a just abatement of price; and this doctrine applies equally to defects in the quantity and quality of land. The same principle was declared in Pennsylvania in the case of *Stoddart v. Smith*, 5 Binn. Rep. 355; on a contract for the purchase of land. If there be a failure of title to part, and that part appears to be so essential to the residue, that it cannot reasonably be supposed the purchase would have been made without it, as in the case of the loss of a mine, or of water necessary to a mill, or of a valuable fishery attached to a parcel of poor land, and by the loss of which the residue of the land was of little value, the contract may be dissolved *in toto*. But the court in the last case, limited very much the right of rescinding a contract for a partial failure of title; for if the sale was of lots in different parts of a city, it was not dissolved by the failure of title to some of the lots, not adjoining or particularly connected with the others, nor essential to their use or enjoyment. It is to be regretted, that the embarrassment and contradiction, which accompany the English and American cases on this subject, cannot be relieved, by the establishment of some clear and definite rule, like that declared in France, which shall be of controlling influence and universal reception.



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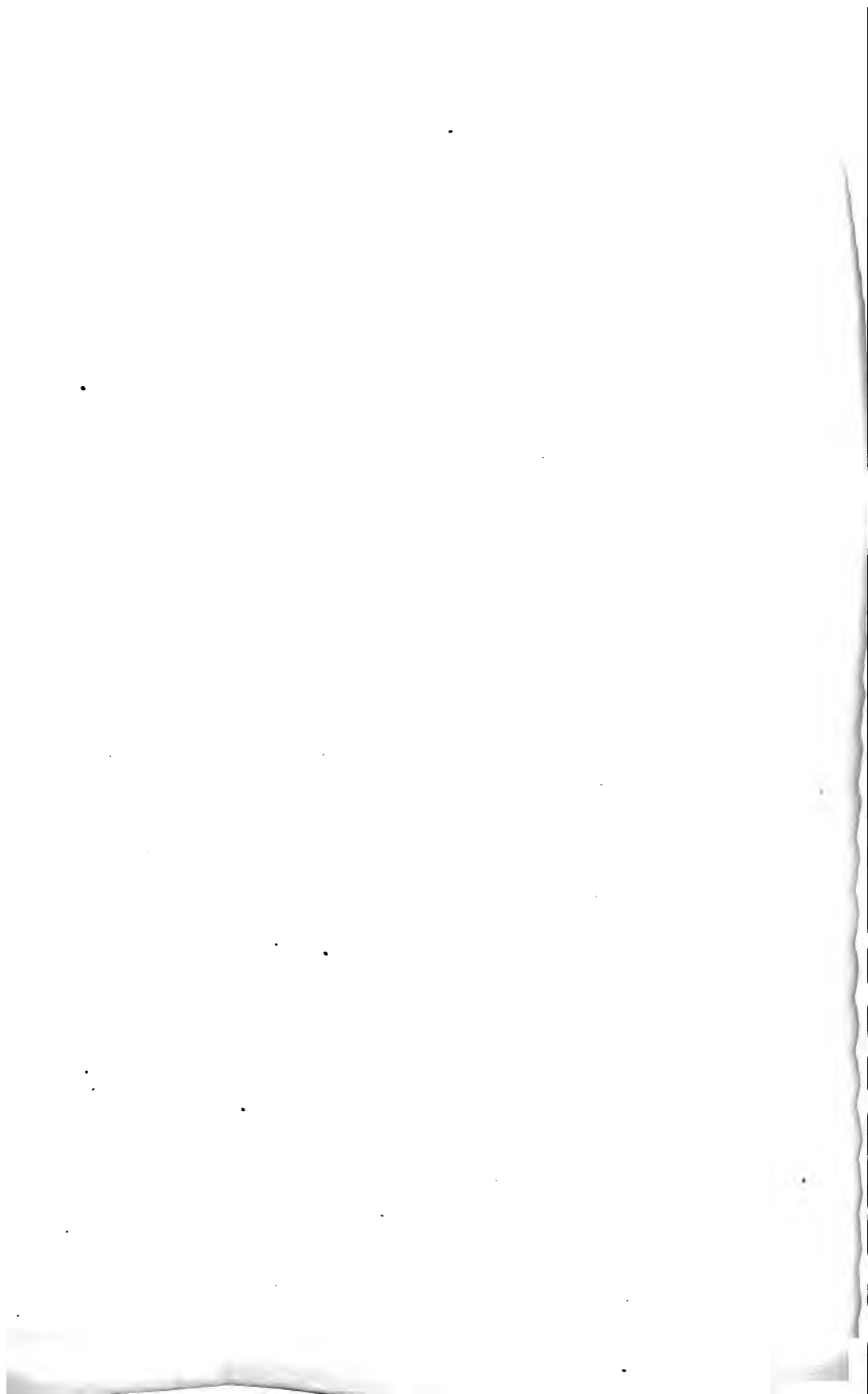
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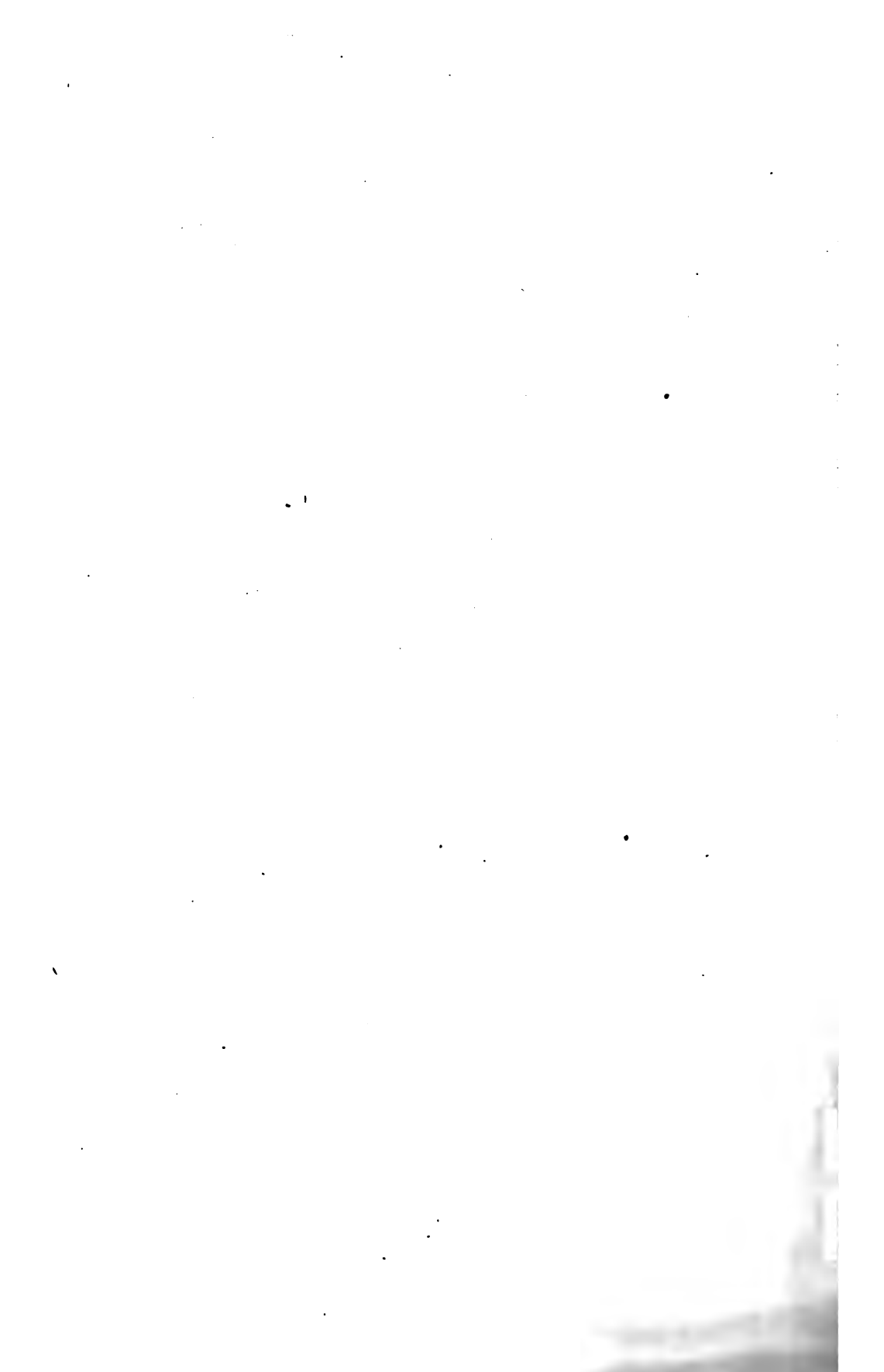
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